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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 95.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA and J. K. DERING COAL COMPANY,
Appellees.

Appeal from the District Court of the United States, Northern District of Illinois, Eastern Division.

BRIEF OF APPELLANT.

(32,095)

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No. 95.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Appellant, v. THE UNITED STATES OF AMERICA and J. K. DERING COAL COMPANY, Appellees.	Appeal from the District Court of the United States, Northern District of Illinois, Eastern Division.

BRIEF OF APPELLANT.

(32,095)

STATEMENT.

Grounds Upon Which Jurisdiction of This Court Is Invoked.———This is an appeal to review a decree of the United States District Court for the Northern District

of Illinois, Eastern Division, dismissing a petition in chancery for want of equity. The petition or bill was filed by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company against the United States of America, J. K. Dering Coal Company, Illinois Central Railroad Company and the Southern Illinois Railway & Power Company on April 8, 1926 (R. 1), and prayed for a decree to set aside and annul an order of the Interstate Commerce Commission, and for certain injunctive relief, in the exercise of the jurisdiction of that Court under Section 41, Par. 28, of the Judicial Code (2 Mason's U. S. Code, pp. 1972-1997). Before the final decree the petition or bill was dismissed on the motion of the plaintiff as to the Illinois Central Railroad Company and the Southern Illinois Railway & Power Company (R. 162). The case was finally heard before Honorable Evan A. Evans, United States Circuit Judge, Honorable James H. Wilkerson, District Judge, and Honorable Adam C. Cliffe, District Judge, and on April 24, 1926, a decree was entered dismissing the petition or bill of complaint (R. 162). The cause was regularly appealed to this Court and jurisdiction depends upon Section 345 of the Judicial Code as amended (Sec. 345, Judicial Code, 2 Mason's U. S. Code 1926, p. 2102). The case was first heard on a motion for temporary injunction which was denied. Answers were filed and issues made upon the sufficiency of the record of the Interstate Commerce Commission to sustain its order. The question decided in the affirmative by the

court below was whether the Interstate Commerce Commission upon the record could lawfully require a switch connection between a track of the J. K. Dering Coal Company extended from its coal mine located on the Illinois Central Railroad, across the railway of that company, an intervening electric railway and three public highways, a distance of three miles to the railway of the plaintiff. This connection was ordered by the Interstate Commerce Commission under the provisions of Par. 9, of Sec. 1 of the Interstate Commerce Act, which is as follows:

> "*Any common carrier subject to the provisions of this chapter,* upon application of any lateral, branch line of railroad, or of *any shipper tendering interstate traffic for transportation,* shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad *or private sidetrack which may be constructed to connect with its railroad,* where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. * * *"
>
> 2 Mason's U. S. Code 1926, p. 3487.

The substantial sufficiency of the bill was not questioned and the questions raised by the issues were of law arising from a practically admitted state of facts. In order to present those questions here it will not be necessary to

state the pleadings in the District Court, as the issues actually involved here are those raised before and decided by the Interstate Commerce Commission.

The J. K. Dering Coal Company, hereafter called the appellee, filed before the Commission a complaint stating these alleged material facts: (1) The existence of the petitioner, the J. K. Dering Coal Company, which we shall hereafter refer to as the appellee, *as a private business* corporation organized by its charter to produce and sell coal; (2) That the defendant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, which we shall hereafter refer to as the appellant, is a common carrier in interstate commerce; (3) That the appellee owns and operates a coal mine located about two and one-half miles northwest of a connection between the rails of appellant and the rails of the Illinois Central Railroad in Eldorado, Illinois, on the northeast side of the railroad tracks and right of way of the Illinois Central Railroad Company, and is engaged in producing and selling coal, having markets chiefly in Illinois, Indiana, Iowa and Wisconsin; (4) That appellee had built and owns a railroad switch track from its coal mine to the right of way of the appellant's railroad at a cost of $100,000; (5) That appellee had made written application to the appellant for a switch connection between the railroad of the appellant and the switch track of the appellee; (6) That the appellant had refused to make such connection; (7) That the connection is reasonably prac-

ticable, can be put in with safety and used without materially increasing the hazard of operation; (8) That the business which may reasonably be expected to be received by appellant from the appellee over said connection will be sufficient to justify the expense; (9) That the switch track connection is necessary to transport to destination coal produced at the mine of the appellee (R. 84-88). The answer puts in issue each and every of these allegations and states additional facts upon which the appellant relied as follows:

(1) The appellee, being a private corporation with only authority to produce and sell coal, has no power under its charter to build, operate, maintain or lease a railroad either for its own use or for the use of others, and, as built, this is a railroad and not a switch track; (2) Appellant admitted that it is a common carrier subject to the provisions of the Interstate Commerce Act, but averred that since the appellee has a direct connection with the Illinois Central, ample to furnish it with adequate service, and is not located on the railway of the appellant, and is not, therefore, entitled to a switch connection with appellant railroad, that it does not lie within the power of the Interstate Commerce Commission to compel a connection with appellee's track for the purpose of giving it additional car supply, or to give it the status of an industry on the railway of the appellant, when it is in fact not so located, and that to compel the connection would in effect require the appellant to extend its railway to

a point where it does not choose to locate it, and where no obligation rests upon it to extend it, and that such an order would be a violation of the due process and equal protection of law clauses of the Fourteenth Amendment to the Constitution of the United States and violate Pars. 18 to 22, Sec. 1, of the Interstate Commerce Act as amended, which requires a certificate of public convenience and necessity before commencing the construction of a new railroad, or the extension of an existing railroad; (3) Appellant admitted that the mine of appellee is located two and one-half miles from its railway, and avers that the same is located on the railway of the Illinois Central, and alleged that it has adequate railway facilities to deliver carload production therefrom to the railway of appellant through a connection at Eldorado, Illinois, and to reach its railway; that the proposed track would cross two railroads and three public highways; (4) Appellant averred that the nearest approach of the appellee's mining property to the railway of appellant is approximately a half mile; (5) Appellant denied that the proposed track connection would be a connection between mine spur or private sidetrack from an industry, but averred that it would constitute in fact and under the law a connecting public railroad between the railways of the Illinois Central and the appellant, and the railway of the Southern Illinois Railway & Power Company and the Illinois Central, and an extension of said railways without a certificate of public convenience and necessity either for the construction of a

new connecting public railway, or for the extension of either of said railways; (6) Appellant averred that the Constitution of Illinois constitutes such a railway as appellee has built a public railway free for the transportation of passengers and freight, and alleged that it is in no sense a sidetrack within the meaning of Section 1, Par. 28, of the Interstate Commerce Act; (7) Appellant averred that appellee had and enjoyed adequate railway facilities and that if it was entitled to relief such relief would be through the regulation of rates and the establishment of joint through rates and routes (R. 88-96). Attached to and made a part of the answer as exhibits are copies of contracts, Exhibit A, made December 20, 1922, between the Illinois Central Railroad Company, party of the first part, and J. K. Dering Coal Company, party of the second part (R. 97-103), and Exhibit B, an agreement between J. K. Dering Coal Company and the Southern Illinois Railway & Power Company (R. 97-99), which contracts refer to each other and make a tri-party agreement.

The findings of the Commission are shown by its report of the approving the tentative report of the Examiner (R. 116-129), and upon further argument before the entire Commission (R. 130-133). The order entered by Division No. V was affirmed (R. 134), and there was no substantial modification of the original tentative report.

It will be observed from a reading of the report adopted by Division V that the following issues were selected as

being the material issues presented by the record: (1) Whether the building and maintenance of such a track is beyond the scope of the powers granted to the appellee by its Illinois charter; (2) Whether such a track, by reason of contracts between the appellee and the Illinois Central, and the appellee and the Power Company, will under the law of Illinois become a public track and be a part of the public highway of the railway with which it shall be connected; and, that the order requiring the connection sought would in legal effect require an extension of plaintiff's line to a point not connected to and would be in effect a taking of its property without due process of law and a denial to it of the equal protection of the law; (3) Whether the making of the proposed connection would complete a new connecting railway between the Illinois Central and the railway of the appellant without a certificate of public convenience and necessity having first been obtained as required by the Illinois Commerce Act and the Interstate Commerce Act, as amended by the Transportation Act; (4) Whether the connection would be reasonably practicable or could be put in with safety, or would furnish sufficient business to justify construction and maintenance. It was then said by the Commission:

> *"The first two contentions are primarily matters of judicial interpretation. They will not be further considered here."*

(These questions were involved in the order entered by the Commission and decided adversely to appellant.)

As to the third specification it was said:

> "To this we do not agree. *We are not called upon to determine what effect the contracts heretofore referred to may have in the event of operation of the mine track by the Central or the Power Company is undertaken.*"

(If these contracts determine the character of the track to be built, as to whether public or private, lawful or unlawful, a sidetrack, connecting railway or extension of railways, we insist they were material and should have been considered. If not within federal jurisdiction to consider their effect, then it was within state jurisdiction and the conclusions of the Illinois Legislature and courts should have been accepted as binding.)

The only question left which the Commission treated as an issue is the fourth specification which depended upon the evidence, and since there was evidence upon both sides the findings of the Commission eliminate it as a question before this Court. Reference to the exceptions filed to the report will show that the report was excepted to upon the grounds: (1) That it did not make specific findings upon the material issues. (2) That it did not pass upon the issues presented by the answer and supported by the evidence. (3) That it did not suggest specific findings of fact or recommend an order of the

Commission based on specific findings of fact and did not embrace all of the material facts as mentioned in the way of recital, and that such facts as were mentioned were by way of recital and not by way of findings. (4) That the recommended finding that the petitioner had tendered interstate traffic within the meaning of Section 1, Par. 9, of the Interstate Commerce Act was contrary to the facts and the law. (5) That the recommended report declined to pass upon two out of four of the material issues which it found presented and a material part of the evidence bearing upon a third. There were other exceptions which it is not necessary to mention more in detail at this time.

An examination of the exceptions filed will show that every conceivable phase of the report of the Commission was excepted to sufficiently to enable the appellant to here raise any question presented by the issues formed by the original complaint and answer (R. 448-450). The detail of the several exceptions is omitted from the printed record as the printed parts show, but the omissions are not thought to be material. In dismissing the bill the trial court affirmed the order of the Commission against these exceptions and decided all of the questions raised upon the record against appellant, leaving all questions presented to the Commission, except those of controverted fact, open for this Court. Here we shall present for consideration only such questions as were passed upon or declined by the Commission not involving

any controversy of fact. It will be incidentally apparent from an examination of the record and the order of the Commission that many of its findings of fact were without evidence to support them, or were directly in conflict with uncontroverted evidence, and so far as we deem them material we shall call attention to such errors, but shall emphasize the errors of law which we state as follows:

Order of Commission Involved Fundamental Errors of Law.———The following fundamental principles based upon the undisputed facts contained in the record were disregarded by the Interstate Commerce Commission in making its findings and order:

(1) Appellee is not a shipper on the railway of appellant tendering interstate traffic to appellant for transportation within the meaning of Paragraph 9, Section 1 of the Interstate Commerce Act. It is a shipper on the railway of the Illinois Central Railroad Company enjoying adequate service from that company and may regularly tender interstate traffic to it which it may deliver to appellant over a switch connection with the Illinois Central at Eldorado. It has constructed a track from its mine connections with the Illinois Central Railroad to the railway of appellant without legal right or authority either under the laws of the United States or the laws of the State of Illinois, to maintain or operate said track. It follows that the Interstate Commerce Commission has coerced appellant to make a switch connection with an unlawful track of appellee to enable the Illinois Central to deliver coal

thereover to the railway of appellant and to draw coal for transportation from the railway of appellant produced on its rails in competition with appellant; that appellant is required to accept this connection and perform this service for a corporation to whom it owes no duty as a common carrier and to its disadvantage as a competing railway with the Illinois Central.

(2) The track with which the Interstate Commerce Commission ordered appellant to "*construct, maintain* and *operate*" a "*switch connection*" with appellant's railway is not "*a private track*" which "*may be constructed*" within the meaning of Paragraph 9, Section 1 of the Interstate Commerce Act.

(3) The track with which the Interstate Commerce Commission ordered appellant to make a switch connection is not a private sidetrack that "*may be constructed*" within the meaning of Paragraph 9, Section 1 of the Interstate Commerce Act. Whether it is a track that "*may be constructed*" within the meaning of that section is a question committed solely to the jurisdiction of the Illinois Commerce Commission and the courts of Illinois by Paragraph 22 of Section 1 of the Interstate Commerce Act. Sections 55 and 58 of the Illinois Commerce Act prohibit the construction of such a track. It, therefore, follows, that the express language of Paragraph 9 of Section 1 of the Interstate Commerce Act does not include the kind of track connected under the order of the Interstate Commerce Com-

mission—that is, it is not a track that "*may be constructed*" within the meaning of the language of that paragraph (Sec. 9, p. 922, Interstate Commerce Act, Revised Code, Title 49, Sec. 1, Mason's U. S. Code, pp. 3487-3489; Illinois Commerce Act, Secs. 55, 58, 1926 Cahill, pp. 1902-1903; Western & Atlantic v. Georgia Public Service Commission, 267 U. S. 495; 69 L. ed. 756-757; The C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 461; Texas & Pacific R. Co. v. Gulf, Colo. & S. F. R. Co., 270 U. S. 266-279; 70 L. ed. 578).

(4) The Interstate Commerce Commission held that the track with which it ordered the connection is not a connecting railway or an extension of railways within the meaning of Pars. 18 to 21, Sec. 1 of the Interstate Commerce Act, but is a sidetrack within the meaning of paragraph 9 of section 1 of that act. Paragraph 22 of section 1 of the act expressly excludes the question of construction and maintenance of sidetracks from the jurisdiction of the Interstate Commerce Commission. Sections 54, 55 and 58 of the Illinois Commerce Act expressly prohibit the construction of a sidetrack across other railways or over highways without a certificate of public convenience and necessity, and the Supreme Court of Illinois has held that this track was unlawfully constructed. It follows that the Interstate Commerce Commission has ordered appellant to make a connection with a track built in violation of the laws of Illinois, which cannot be maintained, and, therefore, its order is unlawful.

(5) The switch connection which the Commission ordered appellant to make would complete a connecting railway between the railway of the Illinois Central and the railway of appellant, and also extend both railways without a certificate of public convenience and necessity as required by Paragraphs 18 to 21, Section 1 of the Interstate Commerce Act.

(6) Completed according to the terms of the contracts under which the Dering track was constructed, the intent of the parties and the force of the Constitution of the State of Illinois, said track would be a connecting railway between the railways of the Illinois Central Railroad Company, Southern Illinois Railway & Power Company and appellant without a certificate of public convenience and necessity, in violation both of Paragraphs 18 to 22, Section 1 of the Interstate Commerce Act, and Sections 55-58 of the Illinois Commerce Act.

(7) By electing to apply to the Illinois Commission for an order to compel appellant to make a switch connection with its track and adjudicating the questions of law and fact arising in said proceedings in the Illinois courts and not appealing from the final judgment of the Supreme Court of Illinois, appellee is estopped to deny the jurisdiction of the Illinois Commission and the conclusions of fact adjudicated and determined by the courts of Illinois in proceedings to contest the validity of the order of the Illinois Commission authorizing the construction of the track and requiring the appellant to connect its railway

therewith, and the final conclusions of the courts of Illinois are conclusive and binding.

A Concise Statement of the Case—The Locus in Quo. ——Appellant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, known under its trade name "Big Four," has a line of railroad extending from Danville, in Vermilion County, Illinois, to Cairo, in Alexander County, in the same state, through Saline County, in a southwesterly and northeasterly course. It has no railway extending from Danville to Chicago and is dependent upon other railways to carry coal from its northern terminus to that city. It is crossed by the St. Louis-Cleveland main line of its railway at Paris, and has a line extending from Springfield, Ohio, through Indianapolis to Peoria. The St. Louis-Eldorado Branch of the Illinois Central Railroad extends from St. Louis, Missouri, through Belleville and Duquoin, Illinois, at which point it crosses the Chicago-New Orleans line of the Illinois Central to Eldorado, in Saline County, Illinois, and there connects with the railway of appellat and regularly exchanges traffic between the railway of appellant and its system. It also has numerous branches extending into the coal fields of Southern Illinois from its St. Louis-Eldorado line in Perry, Franklin and Williamson counties, and has several mines on its railway at and in the neighborhood of Eldorado and is building a new line, the Effingham, Illinois, Fulton, Kentucky, cut-off, through the coal fields of Saline County, over which it will carry its through traffic from Chicago

to New Orleans, and which line connects with its present main line at the points named.

This general situation is shown by Exhibit XXVI, a map of the geological survey, locating the mines in the State of Illinois (R. 428); a map of Mr. Blickensderfer, Exhibit XXIX, showing the location of the mines in Saline County, the present proposed track and the proposed cut-off of the Illinois Central, which is in course of construction (R. 431); Exhibit XXXIII, a map of the State of Illinois, showing the location of the lines of the Illinois Central and Big Four and other railroads within the coal territory of the state (R. 434); Exhibit XXX, Stokeley, showing an illustration on a scale of the proposed track, the track and outlay of the Dering mines on the Illinois Central and the proposed connection with the railway of appellant (R. 431, being the second item after page 430, which bears no number).

Appellant has a first and second main track extending from Carrier Mills, a point about seven miles south of Harrisburg, north to Eldorado, a distance of about fourteen miles. The second main, being the west track, the connection with appellee's track, is at a point about four miles south of Eldorado and three and one-half miles north of Harrisburg. There are a large number of mines located along the main track between Eldorado and Carrier Mills. Appellant has a large switching and assembling yard at Harrisburg where cars are taken for distribution, thence taken over these lines to the mines, loaded, returned

to the mines and classified in trains for movement to market. When loads are ready for movement the clerks of the coal companies notify the railroad officials, the coal is billed at Harrisburg, all move on the same rate to market and are taken by the railway company from the mines on its railway to Harrisburg, classified and moved under the billing in trains to market. The movement to market is from the respective mines to the point of destination. This is fully explained in the testimony of Mr. Pauley (R. 362-369) and Mr. Milligan (R. 401-403), and the location of the mines is shown on the Blickensderfer Exhibit No. XXIX (R. 429).

By referring to the map made a part of the bill (R. 33) and the testimony of Mr. Stokeley (R. 285), it will appear that from the Dering mine to the connection of the Illinois Central with the Big Four in Eldorado is 3.35 miles. (This has been referred to as 2½ miles, but the engineer's figures are correct.) From Harrisburg north to the connection ordered by the Commission is 3.1 miles; from this connection to Eldorado 4.3 miles; from the point of the switch of the Illinois Central at Dering mine to the connection of the new track with the track of appellant is 2.9 miles. The Wasson mine is located within reach of the connection and between the track of the Southern Illinois Railroad & Power Company and the track of appellant (R. 33). The arrangement between the Illinois Central and appellee was that the Illinois Central should also have access to the Wasson mine, and it was an agreement, not expressed

in contracts that were executed at the time, that this was a necessary condition to the contract made between the Illinois Central and appellant for the construction of this track (R. 356, 381). Mr. Pauley said: "It is only on condition that the Illinois Central can have access to the Wasson mine that it is making this arrangement." If this track shall remain connected with the rails of the Illinois Central and the rails of appellant it will give the Wasson mine the right under the Constitution of Illinois to use it as a public track (The C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 461).

The appellant has a number of mines located on its line at Eldorado, between Eldorado and Harrisburg, and on its Harco Branch extending westerly from Harrisburg. This appears from the Blickensderfer map to which we have called attention. The coal development in Saline County occurred about the year 1905, and the appellant at that time spent a large sum of money, several millions of dollars, in reconstructing its line and providing facilities to carry coal traffic then developed, and in prospect, and is dependent upon that traffic to earn a fair return on its investment. Shortly subsequent to that date the predecessor of the Southern Illinois Railway & Power Company built an electric line from Carrier Mills paralleling the line of appellant on the west side of its railway from Carrier Mills, a point several miles south of Harrisburg northeasterly through Harrisburg to Eldorado. It was built as an electric interurban railroad and has

since that time until the present been operated as such. The changing conditions have inspired this company to endeavor to enter the general field of railway transportation, as will appear from the statements of its vice-president to which we shall hereafter draw attention. About midway between Eldorado and Harrisburg, approximately 4 miles south of Eldorado, is located what is known as Wasson Mine No. 1, to which we have drawn attention. Prior to the location of appellee's mine No. 2 it owned and was operating a coal mine called Dering Mine No. 3, located northeast of Eldorado, a mile or more, on the railway of appellant.

The J. K. Dering Coal Company acquired a tract of land in excess of 3,000 acres upon which its mine No. 2 was located, as shown by map (R. 33). This tract of land does not touch the railway right-of-way of appellant at any point and its nearest approach to it is approximately one-half mile from its right-of-way (R. 357). The track connection ordered is between the main line of appellant's railway and a track constructed by the Illinois Central Railroad Company under contracts with the J. K. Dering Coal Company from Dering Mine No. 2 to the railway of appellant at a point southwest of Wasson Mine No. 2, as shown by the plat just referred to.

Prior to the location of mine No. 2, there were some negotiations between appellant and the Dering Company in an effort to make an arrangement by which appellant and the Illinois Central under a reciprocal switching ar-

rangement would treat the Dering Mine No. 2 and Dering Mine No. 3 as joint mines on both railways (R. 357, 358), at a time when the production of mine No. 2 became equal to that of mine No. 3 (R. 186). No definite agreement was reached. The only influence these negotiations had upon the location of Dering Mine No. 2 was that according to the testimony of the vice-president of the Dering Company the mine would probably have been located on the west side of the tracks of the Illinois Central instead of the east side of its tracks (R. 185). The time when it was contended by the Dering Company that the production of its mine No. 2 had reached a practical equivalent in quantity to that of its mine No. 3 arrived in the year 1917 during federal control of railways by the Director General.

Director General and Interstate Commission and Not Appellant Responsible for Failure of Reciprocal Switching Arrangement of Dering Mines Case.———The Dering Company applied to the railway companies to put the reciprocal switching arrangement in force which had previously been discussed, and the officers of the Director General operating the Big Four refused to consummate the arrangement because of the expense that would be incidental to such an arrangement (R. 187, 188). The Dering Company became impatient and filed a petition before the Interstate Commerce Commission to compel the carrying out of what it insisted was a tentative agreement, which was docketed as Docket No. 10,945, and heard

upon evidence by the Interstate Commerce Commission (R. 188). The cause was submitted October 13, 1920, and decided June 17, 1921. The petition was dismissed and the Commission in its report held:

> "This case, in so far as the question of joint service is concerned, is controlled by the principles announced in Ridge Coal Mining Co. v. M. P. R. R. Co., 62 I. C. C. 259. We there found, in substance, that the service of a mine by a carrier under a trackage agreement is, in practical and legal effect, the substantial equivalent of an extension of its rails to the mine; that the mine which is accorded a joint status by means of a trackage agreement is in the same category as a junction-joint mine, and that, generally speaking, a carrier is not chargeable with undue prejudice because it extends its service to certain mines, either by extensions of its rails or under trackage agreements, thereby giving them the advantages of a joint or junction-point status, while declining to make other extensions or trackage agreements to extend its service to other mines" (Dering Mines Co. et al. v. Director General, Illinois Central Railroad Company et al., 62 I. C. C. 265).

It will be noted that the Commission held that Dering Mine No. 2 was not entitled to Big Four service without the voluntary consent of the latter because it had the service of the Illinois Central and was not located on the Big Four rails. After the Dering Mines case was decided adversely to the contentions of appellee it made an infor-

mal application to appellant to permit a track connection between a private sidetrack which it proposed to build from its mine to connect with the railway of appellant at some point on its line. No officer of the appellant ever agreed to the connection of a track of the kind built (R. 210). After some negotiations there was apparently a tentative suggestion made by appellee to permit such connection within the switching limits of Eldorado. Mr. Worcester, the vice-president of appellant, acting as its general manager, by his letter of October 28, 1921, to Mr. Pauley, the vice-president of appellee, informed the latter that such switching limits extend from a point .3 of a mile north of the freight station in Eldorado to a point 1.3 miles south of the freight station in Eldorado (R. 13). This proposition was not agreed to or acted upon by the appellee, and no such track was built, nor were there any other negotiations prior or subsequent to that date in which any agreement was reached (R. 210).

Abandonment of Effort to Agree—Complicity With Illinois Central and Southern Illinois Railway & Power Company.———This was definitely stated by Mr. Pauley in his testimony. He said: "No positive agreement was ever made that the switch would be built by anybody." The effort to make an agreement concerning the construction of any track was abandoned some time prior to December 22, 1922 (R. 97), when Pauley entered into two contracts for the construction, maintenance and joint operation of the track in controversy by the Illinois Cen-

tral Railroad Company and the Southern Illinois Railway & Power Company. These contracts were separately entered into with the respective parties named, but refer to each other and really constitute a single arrangement. That between the appellee and the Illinois Central provides that the Railroad Company grants to the Coal Company the right to lay down, maintain and operate a single-track railway of standard gauge over and across its waylands and tracks to a point 50 feet west of mile-post No. 118, and to connect said track with the lead track leading out of the Railway Company's main track to the mine of the Coal Company. (Then provides for construction under supervision of engineer, changes to be made, conditions of operation and protection of crossing, etc., and continues) that:

Dering-I. C. Contract.

"5. The Coal Company shall, at its own expense, **procure all right of way required for said track and secure the necessary permission from Government authorities to construct, maintain, operate and use said track, and make proper arrangements with the Southern Illinois Railway & Power Company and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company over which and with which companies' tracks said track to be constructed hereunder is to cross and connect.**"

"6. The Railroad Company agrees after the provisions of Article 5 hereunder shall have been com-

plied with by the Coal Company and the payment to it by the Coal Company of the sum of sixty thousand dollars ($60,000.00), to lay and construct said track and furnish all material needed therefor." (Continuing in relation to details of construction.)

"It is mutually understood and agreed that **in the event the Coal Company is unable to arrange for a physical connection between said track and the tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, or be assured of the transportation service of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for coal produced at said mine, and comply with the provisions of Article 5,** then there shall be no obligation on the part of said Coal Company to construct or pay for the construction of said track, and all of the **obligations imposed by this contract** on the respective parties hereto **shall be made null and void.**"

"7. The Railroad Company further agrees to maintain said track in suitable condition, furnishing all labor and material required therefor, and the Coal Company agrees, within ten (10) days after receipt of statement, to reimburse the Railroad Company for all expenses actually incurred by the Railroad Company in the maintenance of said track, plus the percentage hereinabove mentioned on labor and material." (Percentage named is 10 per cent.)

"8. It is expressly understood and agreed that the employes of the Railroad Company while engaged in the construction and maintenance of said track and supervision of such work shall, while so engaged, be considered the sole employes of the Coal Company. * * *"

9. (This section relates to liability concerning crossing protection, etc.)

10. (Relates to the payment of bills rendered by the railroad company.)

"11. As a further consideration for the covenants and agreements to be kept and performed by the Railroad Company herein provided the Coal Company does and **hereby grants to the Railroad Company the right to use said track and operate its engines and care thereover, jointly with such other company or companies as may be permitted by the Coal Company to use said track, and also the right to construct spur tracks leading out of said track, but the expense in connection with such spur tracks shall be assumed by the Railroad Company.** The Railroad Company agrees to use said track in such **manner as to not unreasonably interfere with the use to be made of same by any other company or companies.** The Coal Company further grants to the Railroad Company the **right to construct a track connecting with the main track of the Railroad Company, and said track to be constructed by the Coal Company hereunder, but all expense in connection therewith shall be assumed by the Railroad Company.**

"12. This agreement shall **continue in force so long as said track to be constructed hereunder shall be used for the purpose of handling coal from said mine or mines of the Coal Company,** and when said track shall be no longer required for such purpose this contract shall terminate and be of no further force or effect save as to those obligations accruing prior thereto, and the Coal Company shall take up and

remove that portion of said track, including the crossing frogs in the tracks of the Railroad Company, as well as any other property of the Coal Company located upon said waylands, and restore said track and waylands of the Railroad Company substantially to their previous condition. If the Coal Company shall fail to make such removal and restoration within ten (10) days after this contract shall have terminated, the Railroad Company shall have the right, at its option, to remove that portion of said track located upon its waylands, including crossing frogs or any other property of the Coal Company located thereon, and restore its waylands and track substantially to their previous condition, at the risk and expense of the Coal Company.

"13. Upon termination of this agreement, or when said track shall be no longer required by the Coal Company, the **Railroad Company shall have the option of purchasing all of said track indicated in red on the plat hereto attached**, and the Coal Company agrees to sell same to the Railroad Company, if it desires to purchase, at a price to be mutually agreed upon, but in no event shall said price be greater than the actual cost to the Coal Company; and if the Railroad Company does not desire to purchase said track, that portion thereof, including said crossings, located on the waylands of the Railroad Company, shall be removed therefrom as in the next preceding article hereof provided.

"14. **This agreement shall be binding upon the successors and assigns of the parties** hereto, but the Coal Company shall not assign, transfer or underlet to any other company or person any of the privileges herein granted by the Railroad Company, or any

interest in this contract, without the consent of the Railroad Company first having been obtained" (R. 97-103).

The agreement between the Coal Company and the Southern Illinois Railway & Power Company provides:

Dering-Power Co. Contract.

1. The Railway & Power Company agrees to permit a crossing to be installed across its track.

2. The Railway & Power Company grants to the Coal Company and its successors the right to maintain the track across its right of way for a period of 99 years.

"3. Party of the first part" (**the Coal Company**) "hereby **grants and conveys to party of the second part the right to operate locomotives or electric engines, trains and cars over said mine lead track for the purpose of transporting passengers and freight from and to all points of origin and destination on said mine-lead track, or transporting freight and passengers originating and distant from and to points on the connecting line, and the right to construct, on and from said mine-lead track, and over and upon the right of way of said mine-lead track, a wye or other suitable track connection between said mine-lead track and the track of the party of the second part, and agrees to pay to party of the second part one-half of the costs and expense of the installation and construction of such wye or connection promptly upon the completion thereof.**"

"4. Party of the first part also grants and conveys

to party of the second part **the right to construct along, upon and over the right of way of said mine-lead track, or adjacent thereto, as party of the second part may desire, poles and wires for the transmission of electric power to be used in the operation of its said engines, trains and cars; provided, that said poles and wires shall be so constructed as to permit steel locomotive railroad operation upon and over said mine-lead track and as not to unreasonably interfere with the use of said mine-lead track by the party of the first part, its agents, lessees, successors or assigns.** And party of the first part also grants and conveys to the party of the second part the **right to construct along and upon the right of way of said mine-lead track poles and wires for the transmission of electric energy for power and sale purposes**; provided, that the poles and wires so constructed for said last-mentioned use shall be so located as not to interfere with the use of said mine-lead track."

"5. Said party of the second part shall conduct said transportation and railroad operations over said mine-lead track **in such manner as will not unreasonably interfere with the transportation of loaded and empty coal cars to and from the said mine of party of the first part**, or to and from any other mine or industry now or hereafter located on, or adjacent to, said mine-lead track."

"6. As a further consideration for the covenants and agreements to be kept and performed by the party of the first part, the party of the second part agrees that it will, at the request of said party of the first part, **transport empty and loaded coal cars between the mine of party of the first part and the tracks of the Cleveland, Cincinnati, Chicago & St. Louis Rail-**

way Company and charge for such service the usual and customary connecting-line switching rates generally maintained and published by the coal-carrying railroads in the State of Illinois for performing similar service. In performing any service desired by said first party under this section, it is understood that said second party shall act as the agent of the first party in performing said service."

"7. In the event **other industries or mines are served over and by said mine-lead track the cost to party of the first part of constructing and maintaining said mine-lead track shall be apportioned** between party of the first part and such other industries in proportion to the amount of use of said mine-lead track for party of the first part and the use of said mine lead track for such other industry."

"8. Party of the first part shall pay the entire cost and expense of constructing said mine-lead track and the cost thereof over the existing track and the right of way of party of the second part herein granted, and also the additional cost and expense made necessary by said crossing in the installation or construction by party of the second part of additional tracks along and over said crossing."

9. Provides for division of the cost of construction and maintenance of crossing protection.

10. Provides for indemnity of second party.

"11. In the event party of the second part shall use said mine-lead track for transporting engines, trains or cars carrying either passengers or freight, or both, party of the second part will pay to party of the first

part its proportion of the expense of maintaining said track, including the expense incurred by said first party in maintaining, protecting and operating said tracks over the tracks of the Illinois Central Railroad Company, said maintenance expense to be apportioned on the basis of the number of cars of party of the second part passing over said mine-lead track to the total number of cars passing over the same."

"12. It is understood between the parties hereto that the party of the first part has heretofore entered into a contract with the Illinois Central Railroad Company, dated December 22, 1922, concerning the construction, maintenance, operation and use of said track and crossing over the Illinois Central Railroad Company's tracks whereby the Illinois Central Railroad Company is granted certain rights, and the party of the first part has assumed certain liabilities and obligations, copy of which contract is attached hereto and made a part hereof and marked "Exhibit B"; and it is agreed between the parties hereto that the rights granted and conveyed by said first party are subject to the limitations and conditions imposed upon it under the terms and conditions of its said contract with the Illinois Central Railroad Company.

"It is further convenanted and agreed that said second party assume all responsibility for and agrees to indemnify the party of the first part for all loss, damage or liability that said first party may suffer or be required to pay, assumed by and imposed upon said first party under the terms and conditions of its said contract with the Illinois Central Railroad Company, or otherwise, caused by the use and operation of said tracks and crossing by the party of the second part under the grant herein made.

"13. Party of the first part specifically reserves the right to abandon and cease operating said mine lead track at any time, and will, upon so doing, surrender the right of way herein granted, and upon such surrender the rights and obligations of the parties hereunder shall cease and determine; provided, that in event of the termination of said agreement by abandonment and surrender as aforesaid, each party shall have the right, notwithstanding such termination, to recover from the other any obligation or liability which shall have accrued under this agreement while the same was effective and in operation; provided, further, that upon such abandonment, and a failure by party of the second part to purchase as hereinafter provided, party of the first part shall at its expense and at the request of party of the second part, remove said crossing over the track or tracks of party of the second part and restore the track or tracks of the party of the second part to proper operating condition. **And provided, further, that in event the Illinois Central Railroad Company does not desire to purchase said track, as provided in said contract hereto attached**, that sixty days prior to such abandonment party of the first part will give notice thereof in writing to party of the second part and will at the request of party of the second part transfer and convey to party of the second part, by proper instruments of conveyance, said mine lead track and all rights and appurtenances thereunto appertaining and belonging at and for an amount equal to the cost thereof to party of the first part, less such sum as will equal then existing physical depreciation.

"14. It is mutually understood and agreed between the parties hereto that the primary purpose for which said track is being constructed by the Coal Company is to use the same in the shipping of coal produced at said mine over the railroad of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and in event that said Coal Company is unable to arrange for a physical connection between said track and the tracks of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, or to be assured of the transportation service of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, as aforesaid, then there shall be **no obligation on the part of said Coal Company** to construct or operate said track, and all of the obligations imposed by this contract on the respective parties hereto shall be null and void" (R. 104-109).

The purpose and object sought to be attained by the execution of these contracts and the construction of the railway track was fully explained by J. Paul Clayton whose testimony was given in another case and was stipulated into the record in a hearing before the Illinois Commerce Commission. Mr. Clayton fully explained the capacity of the Southern Illinois Railway and Power Company to do business, its desire to make connection with all railroads and extend its business, its connection in Harrisburg with the Illinois Central Railroad and its ambition to operate the track about to be constructed by the Coal Company. His testimony is full of the spirit of his company and the arrangements and prospects sought

to be accomplished by the contracts from which we have quoted (R. 408-418).

Referring directly to the contracts and purposes of his company and the Dering Company, he said:

> "The Dering Coal Company has been before the Commission, and the Commission issued an order to that company to construct a track from the mine of the Dering Coal Company, northwest of Eldorado, across the track of the Southern Illinois Railway and Power Company, and to connect with the tracks of the Big Four. This company has entered into a contract with the Dering Coal Company, which contract is on record with this Commission, for equal user rights on this switch track on equal terms with the Big Four and the I. C. The situation is identical, namely, the cars of the coal company, to get to the Big Four, first cross the line of the Southern Illinois Railway and Power Company, exactly as this crossing. But there the Dering Coal Company was willing and anxious to make 'Y' connection with the Southern Illinois Railway and Power Company, and there the Dering Coal Company did not enter into a contract with the Big Four for any exclusive rights of this switch, **because they have built this track and intend to have it used by whoever may want to use it. They have not parted with their rights** * * *" (R. 412). "That was the petition of the Dering Coal Company, Illinois Central and the Southern Illinois Railway and Power Company. I don't remember the number of that case offhand, but the I. C. Railroad entered no objections similar to these people. It agreed to equal right of user on this switch with themselves on the part of the

Southern Illinois Railway and Power Company. I wish also to make it clear in such an equal right of users the Southern Illinois Railway and Power Company is willing to enter into an equitable contract for apportioning the cost of the 'Y' track, and is willing to itself spend the money for the overhead electric connections, which will not cost anything to the coal company, which will be sufficient clearance for all trains of the railroad company, and also to enter in an agreement regarding the maintenance of this track in proportion to the cars handled over it * * *" (R. 413). "In endeavoring to serve the public with freight and passenger service along its line the company has endeavored to make every connection that every other common carrier does under those circumstances. It has met with encouragement and co-operation with the I. C. Railroad and the L. & N. Railroad, but it has been met always in opposition by the Big Four" (R. 414).

"I don't know that the Big Four is resisting the construction of that track, because we have had no dealings with the Big Four. I testified to that contract with relation to the Dering Coal Company and the Illinois Central, and the three parties, the Dering Coal Company, the Illinois Central and the Southern Illinois Railway and Power Company, were parties to this petition, and I personally signed and knew we had relations with them" (R. 418).

This testimony was the first disclosure to appellants of the purpose and object of the construction of this track, and the proceedings in the case before the Illinois Commerce Commission in Dockets Nos. 12,819 and 12,891, made

a part of the record herein, show that the contracts were not, as stated by Mr. Clayton, placed on record with the Commission, but that these parties joined in petitions and had the orders made to which he refers without notice to the appellant and without giving the Commission any notice of the contracts (R. 325, 331). The orders were subsequently set aside because of want of notice, and the order conferring the right upon the Illinois Central Railroad Company to construct the track was set aside and similar authority granted to the appellee (R. 325).

After the contracts were agreed upon, and before they were executed in writing (R. 356), the Illinois Central Railroad Company, the Southern Illinois Railway and Power Company and appellant did not join in an application to the Illinois Commerce Commission for an order granting permission to the Illinois Central to construct and maintain the track provided for in said contracts across the railways of the Illinois Central and the Power Company, and three intervening public highways, under Docket No. 12,819. The petition was filed November 25, 1922 (Exhibit C, R. 109), the crossings were viewed by an engineer of the Commission November 28, 1922, and an order of the Commission granting authority to the **Illinois Central Railroad Company** to build and maintain said track was entered December 14, 1922. Annexed to the petition was the consents of the Illinois Central and the Power Company to construct said tracks across their railways at grade and the consent of the Highway Commis

sioner of Raleigh Township to cross said highways at grade (R. 111-112). Appellant received no notice of this proceeding, and the order of the Commission was entered ex parte. Among other things granted to the **Illinois Central Railroad Company** was authority in these words:

> "It is further ordered that permission be and the same is hereby granted to the Illinois Central Railroad Company to construct and maintain, or cause to be constructed and maintained, at grade across the single maine track of the Southern Illinois Railway & Power Company, a mine lead track for the purpose of serving the J. K. Dering Coal Company in the operation of its coal mines at a point 3½ miles southeast of Eldorado, near the center of section 36, Raleign Township, Saline County, Illinois, as shown diametrically on a certain blue print dated November 22, 1922, attached to the petition in this case and made a part thereof, and to operate its trains and cars thereover. * * *"

Like authority was granted to the **Illinois Central** to construct and maintain said track across its own railway and three intervening public highways (R. 114, 115). Subsequently a petition was filed by appellee against appellant for an order to connect said track with the railway of appellant at the point of intersection a very short distance south of Wasson Mine No. 1 (R. . . .). Subsequently said cause was set for hearing, and on the hearing thereof it first definitely appeared that authority had been granted to construct and maintain this track under cer-

tain contracts which had been withheld from the Illinois Commission (R. 109, Exhibit C). That the order had been allowed ex parte without giving notice to appellant, and thereupon a motion was made to set aside the order, which was subsequently done, and the two cases were consolidated and heard as one case. The orders were on the 3rd day of May, 1923 (R. 331, 336), granted by the Illinois Commission giving authority to construct the track to appellant substantially as it had theretofore been granted to the Illinois Central Railroad Company and ordering a connection of the track under authority of Section 45 of the Public Utilities Act, which provides as follows:

> "Every railroad company, upon the application of any corporation or person, being a shipper or receiver, or contemplated shipper or receiver, of freight, or of any corporation, person or municipal corporation, owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover: Provided, that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company.

"Under the conditions specified in the above proviso every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, shall construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby."

Chap. 111 (a), Par. 60, Cahill's Ill. Stat. 1925.

There was no prayer in either of the petitions filed before the Illinois Commerce Commission for a certificate of public convenience and necessity, nor did either of the orders in those cases grant such a certificate, but it was assumed by counsel for the petitioner that such a certificate was not necessary throughout the hearing. The cases were appealed on the joint record in cases No. 12,819 and No. 12,891 to the Circuit Court of Saline County to contest the validity of the orders (R. R. & Warehouse Com. v. L. & M. R. Co., 267 Ill. 337).

The appeal was perfected and the record filed in the Circuit Court of Saline County July 27, 1923 (R. 418), a copy of notice for a stay order was served September 21, 1923 (R. 420), on September 25, 1923, counsel for appellant would move for an order to stay and suspend the orders of the Commission entered in said cause on May 3, 1923, and May 8, 1923, and presented said motion to the Court, and on October 3, 1923, a stay order was entered by agreement (R. 421); that order continued in force

until the appeal was perfected to the Supreme Court of Illinois under bond approved the 11th day of January, 1924 (R. 422). Nevertheless, the appellant proceeded with the construction of the track prior to the final order of the Circuit Court and at the time the complaint was heard by the Interstate Commerce Commission proof was made that the track had been completed while the stay orders were in effect.

The testimony showed that the laying of the road was done between July 15, 1923, and November 11, 1923, and the track work done between January 1, 1924, and January 9, 1924. The appeal was heard at the April Term of the Supreme Court in 1924. So, it appears that the track was principally constructed in violation of stay orders and the entire work was done after an appeal had been perfected to the Circuit Court of Saline County to test the validity of the orders of Illinois Commerce Commission (R. 289).

Record of the Supreme Court of Illinois Showing Estoppel.———At the final hearing in the District Court a record of the final judgment of the Supreme Court of Illinois reversing the decision of the Illinois Commerce Commission was offered in evidence as matter of estoppel. It shows that all of the contentions of appellee before the Interstate Commerce Commission were decided adversely to it, and also adversely to the decision of that Commission. The petition of the Illinois Central Railroad Company, Southern Illinois Railway & Power Company and

the appellant for authority to build the proposed track in Docket No. 12,819 (R. 452), the answer thereto by appellant (R. 454), a petition to reopen the case and for orders in the consolidated cases, No. 12,819 and No. 12,891 (R. 457), answer thereto (R. 458), the petition for the rehearing on the orders of the Commission (R. 459), amended petition for a rehearing (R. 467), notice of appeal from the order of the Commission (R. 469), the perfecting of the appeal (R. 470), the bill of exceptions filed in the Circuit Court of Saline County (R. 471), the orders of the Illinois Commerce Commission in No. 12,819 and No. 12,891 (R. 471, 472), the assignment of errors in the Supreme Court of the State of Illinois (R. 472), the judgment of the Supreme Court reversing the decision of the Illinois Commission in Dockets Nos. 12,819 and 12,891 (R. 473), show that the same questions that were here under consideration were reviewed by the Supreme Court of Illinois and decided adversely to the contentions of the appellee. There was no appeal from this decision and we contend it must be taken and held by this Court as conclusive and binding against any contention that may be made to the contrary by the appellant in this court. The same questions were presented to the United States District Court on a review of the record in the Interstate Commerce Commission, and we shall insist upon the following errors assigned upon the record.

Assignments of Error Filed June 10, 1926.——And now on this 10th day of June, 1926, came the plaintiff

(appellant), by its solicitors, whose names are subscribed hereto, and says that the decree in said cause is erroneous and against the just rights of the said plaintiff (appellant) for the following reasons:

(1) Because said decree finds the issues against the plaintiff and dismisses the plaintiff's bill.

(2) Because the decree did not find the issues and each of them in favor of the plaintiff and enter a decree in this cause setting aside and holding for naught and declaring void the orders of the Interstate Commerce Commission in cause Docket No. 15,552 entered on February 7, 1925, and all orders entered since that date in said cause, including the order entered on the 1st day of March, A. D. 1926, making effective on May 4, 1926, the order of February 7, 1925.

(3) Because said decree in effect affirms the orders of the Interstate Commerce Commission of February 7, 1925, March 1, 1926, making such orders effective on May 4, 1926.

(4) Because said decree did not find and hold that the track described in the complaint of the J. K. Dering Coal Company to the Interstate Commerce Commission in Docket No. 15,552 is not a spur track within the meaning of paragraph 9, or (G), Section 1, of an Act to Regulate Commerce, approved February 4, 1887, as amended, and that the complainant was not entitled to relief under the provisions of said paragraph, and that the orders of the Interstate Commerce Commission are for that reason void.

(5) Because said decree did not find that the complainant, the J. K. Dering Coal Company, at the time of filing its complaint, was not as to its mine No. 2 as described in the complaint filed with the Interstate Commerce Commission in Docket No. 15,552, a shipper in interstate commerce on the railway of the railway of the plaintiff tendering freight for shipment on said railway, and for that reason the orders of the Interstate Commerce Commission here involved are void.

(6) Because said decree did not find that the evidence in said cause as introduced before and heard by the Interstate Commerce Commission in Docket No. 15,552, failed to establish the material allegations of the complaint as required by paragraph 9 or (G), section 1 of an Act to Regulate Commerce, approved February 4, 1887, and acts amendatory and supplemental thereof, to entitle the complainant, the J. K. Dering Coal Company, to the relief prayed by said petition, and for that reason the orders of the Interstate Commerce Commission here involved are void.

(7) Because said decree did not find that the evidence before the Interstate Commerce Commission failed to show that the J. K. Dering Coal Company was a shipper tendering interstate traffic for transportation upon the railway of the plaintiff on a private sidetrack which had been lawfully constructed to connect with the railway of the plaintiff; that such connection was reasonably practicable and could be put in with safety,

would furnish sufficient business to justify the construction and maintenance of the same, and that for said reason the orders of the Interstate Commerce Commission here involved are void.

(8) Because said decree did not find that the proposed track described in the complaint filed by the J. K. Dering Coal Company and by the testimony of witnesses in case, Docket No. 15,552, lately pending before the Interstate Commerce Commission, was not a lateral or branch line of railroad, or a private sidetrack within the meaning of paragraph 9 or (G), section 1 of an Act to Regulate Commerce, approved February 4, 1887, as amended and supplemented, and for that reason the orders of the Interstate Commerce Commission here involved are void.

(9) Because said decree in effect erroneously finds and holds that the proposed track described in the complaint and by the evidence in case Docket No. 15,552, lately pending before the Interstate Commerce Commission, is a private sidetrack of a shipper tendering interstate traffic for transportation within the meaning of paragraph 9 or (G), section 1 of an Act to Regulate Commerce, approved February 4, 1887, and acts amendatory and supplementary thereof contrary to both the law and the undisputed testimony in said cause.

(10) Because said decree did not find from the evidence (record):

(1) That the purposes and objects of the construction of the track described by the complaint and the

evidence in case, Docket No. 15,552, lately pending before the Interstate Commerce Commission, and the proposed connection thereof with the railway of plaintiff was and is—

(a) To enable the Southern Illinois Railway & Power Company and the Illinois Central Railroad Company to invade the coal territory located upon the railway of plaintiff;

(b) To take from plaintiff the transportation of coal produced upon and along its railway; and

(c) To compel plaintiff in legal and economic effect to extend its railway about three miles into new territory and take coal for transportation off (from) the railway of the Illinois Central (Railroad Company);

(2) That service to the J. K. Dering Coal Company was a mere incident to the general plan and scheme of the J. K. Dering Coal Company, the Illinois Central Railroad Company and the Southern Illinois Railway and Power Company to take (withdraw) coal traffic from the railway of plaintiff; and

(3) That said track, when connected, would be a connecting railway between the railway of plaintiff and the railways of the Illinois Central Railroad Company and of the Southern Illinois Railway and Power Company, constructed without a certificate of public convenience and necessity from the Interstate Commerce Commission, in violation of paragraphs 18 to 22, inclusive, section 402, of the Transportation Act, 1920;

and the said orders of the Interstate Commerce Commission are, for the reasons aforesaid, void.

(11) Because said decree did not find that the track constructed by the Illinois Central Railroad Company for and in connection with the J. K. Dering Coal Company constitutes a new connecting railway and is an invasion of the transportation territory of the plaintiff in violation of paragraphs 18-22 of section 402 of the Transportation Act as contained in 1920 Supplement, Federal Stat. Ann., pp. 98-99, without a certificate of public convenience and necessity and is for that reason void.

(12) * * *

(13) Because said decree did not find that, if the track described in the complaint and by the evidence heard in Docket No. 15,552, lately pending before the Interstate Commerce Commission, be held as an industrial or spur-track for the use of the J. K. Dering Coal Company, its construction, maintenance and operation would be within the jurisdiction of the Illinois Commerce Commission and Illinois courts, and if it be held as a connecting track between the railway of the Illinois Central Railroad Company and the railway of the plaintiff, or as a track in extension of either the railway of the Illinois Central Railroad, or the railway of the plaintiff, it would be within the jurisdiction of the Interstate Commerce Commission and the federal courts and would in that event be controlled by paragraphs 18-22 of section 402 of the Transportation Act, and could not be constructed, maintained or operated without first obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission; that in either event said track,

as constructed and proposed to be maintained and operated, is an unlawful track built contrary to either the laws of the State of Illinois, or the laws of the United States, and that in ordering a connection therewith the Interstate Commerce Commission exceeded its power, jurisdiction and authority and that the orders of the Commission are, therefore, void.

(14) Because the said decree did not hold and find that paragraphs 18-22, of section 402 of the Transportation Act have so amended and modified paragraph 9, or (G), of section 1, of an Act to Regulate Commerce, approved February 4, 1887, that the Interstate Commerce Commission has no jurisdiction to order a connection between an industrial or spur-track constructed to serve an industry and the railway of an interstate carrier, though said track be useful and used in the transportation of both interstate and intrastate commerce, and no jurisdiction to require such a track or such a connection to be maintained, used or operated in interstate commerce, and for that reason the orders of the Interstate Commerce Commission here involved are void.

(15) Because said decree in effect holds that the construction and maintenance of the track with which the connection was sought in the proceedings in Docket No. 15,552, is not within the jurisiction of the Interstate Commerce Commission, yet holds that the connection between said track and the railway of the plaintiff is within the jurisdiction of the Interstate Commerce Commission, not-

withstanding the provisions of paragraphs 18-22, section 402, of the Transportation Act.

(16) Because said decree did not hold and find that if the track with which a connection was sought by the proceedings in Docket No. 15,552, lately pending before the Interstate Commerce Commission, is not a private sidetrack, then it was not such a track as is described by the complaint in said cause and would not be within the description of a track within the terms and language of said paragraph 9, or (G), of section 1 of an Act to Regulate Commerce, approved February 4, 1887, and the order of the Commission requiring connection therewith is void.

(17) Because said decree did not find and hold that the finding and orders of the Interstate Commerce Commission to the effect that the track with which the connection was sought is a private sidetrack within the meaning of paragraph 9, or (G), of section 1, of an Act to Regulate Commerce, approved February 4, 1887, is contrary to the facts established by the undisputed evidence contained in the record, and, therefore, the order of the Interstate Commerce Commission so holding and finding is void.

(18) Because said decree does not hold:

(1) That the power, jurisdiction and authority of the Interstate Commerce Commission and the federal courts over the construction, maintenance and operation of a connection with the proposed track is controlled by the proviso in Paragraph 22, Section 402 of the Transportation Act in relation to spur, industrial, team, switching

and sidetracks located, or to be located, wholly within a single state;

(2) That the adjudication of the Illinois Commerce Commission orders in the courts of Illinois, in Illinois docket Nos. 12,819 and 12,891, by the courts of Illinois, was and is final and conclusive upon the Interstate Commerce Commission and the federal courts, (a) as an estoppel (b) by force of Section 1 of Article IV of the Constitution of the United States, which provides, "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state"; (c) and, that the construction and application of Paragraph 22 of Section 402 of the Transportation Act, and Section 45 of the Illinois Public Utilities Act, which provides:

> "Every railroad company upon the application of any corporation or person, being a shipper or receiver, or contemplated shipper or receiver of freight, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover: Provided, that such connection is reasonably practicable and can be installed and used without materially increasing the hazard to the operation of the railroad with which such connection is sought, and the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company."

by the Illinois Supreme Court are binding as a precedent upon the courts of the United States.

(19) Because said decree did not find that the adjudication of the right of the J. K. Dering Coal Company to a track connection between the track described in the complaint in Docket No. 15,552, and of the facts involved in an effort to compel such a connection under Sections 45 and 46 of the Public Utilities Act of Illinois, in the courts of Illinois, is conclusive as an estoppel upon the J. K. Dering Coal Company and the United States as its representative in this proceeding to allege, claim or prove to the contrary of such adjudication and the findings of fact therein, either before the Interstate Commerce Commission or the courts of the United States, and for that reason the orders of the Interstate Commerce Commission in said cause are void.

(20) Because said decree does not find that the Interstate Commerce Commission failed to make sufficient findings of fact in case, Docket No. 15,552, as a basis for the orders of said Commission entered therein, and that for that reason the said orders are null, void and of no effect.

(21) Because said decree did not find that the Interstate Commerce Commission neglected and refused to make findings of fact upon all of the material issues presented by the complaint and answer thereto in case, Docket No. 15,552, namely, upon the issues:

(a) Whether said track was constructed for the purpose of enabling the Illinois Central Railroad and the

Southern Illinois Railway & Power Company to invade the coal transportation field then occupied by the plaintiff.

(b) Whether the construction of said track was reasonably necessary to enable the J. K. Dering Coal Company to reach the coal markets to which coal produced at its mine No. 2 might be shipped in interstate commerce.

(c) Whether the existing track connection between the Illinois Central and the railway of the plaintiff was or was not a sufficient and adequate outlet to the railway of the plaintiff from the J. K. Dering Coal Company mine No. 2, to the markets available to be reached over the railway of the plaintiff.

(d) Whether, on the whole, the construction of such track would result in a net revenue to the plaintiff sufficient to justify the construction, maintenance and operation of the track connection ordered, and that for the failure of the Interstate Commerce Commission to make findings upon these issues its order is null, void and of no effect.

I.

SUMMARY OF FACTS AND LAW PRESENTED IN ARGUMENT.

(We shall here attempt a complete summary of material and controlling facts relating directly to points which we shall present in argument and follow the same with a brief of the law aplicable thereto.)

(1) **Appellant's Investment and Facilities.**——In 1905 the coal development in Saline County had progressed to a point where there was urgent need of transportation facilities. Appellant had no railway capable of meeting this demand, nor did any other railroad located in Saline County have adequate facilities. The first and most of subsequent development came adjacent to appellant's railway. Appellant made an investment, commencing in 1905, of twenty million dollars to meet that demand, and in anticipation of the development that has since occurred established good facilities to handle and transport such coal as has been produced upon its railway (R. 313-315). At the time the petitions were filed before the Illinois Commission and the Interstate Commerce Commission in this case the maximum capacity of these facilities at the point of the proposed connection had been reached (R. 296, 298). On appellant's railway are twenty three mines (R. 293), served by thirteen switch en-

gines, moving from 275 to 280 loads over the double tracks of appellant between Harrisburg and Eldorado daily and a volume in January, 1925, of 12,483 cars, or 47 trains (R. 238-240, 404). This is appellant's only profitable source of revenue (R. 313). The evidence shows that the success and permanency of this railway economically depends upon its coal traffic. The contracts in evidence and the testimony to which we have drawn attention, we contend, establish that the proposed invasion of its field is in conflict with the settled policy both of the federal and state law regulating railways by which railway companies are given a regulated monopoly of business built up by them and originating on their lines.

(2) **Incompetency of Appellee to Build Track.**——Appellee is a private business corporation, without charter authority to build, own, lease or operate a public railway or any railway which the public would have the lawful right to use (Pauley, R. 182, 353, 207).

(3) **The Evidence Shows That Appellee Is Not a Shipper on the Railway of Appellant.**——Its coal properties at the nearest point of approach are a half mile from appellant's right of way (R. 208). Its plant is located on the railway of the Illinois Central and its mining property extends on both sides of the main track of that company (Plats, R. 33; 424 fol. No. 423). All coal mined at the mine of appellee has been transported to market over the Illinois Central Railway, either to destination or to

connections, and delivered to other railways to be transported to destination. General Manager Pauley testified: "I cannot say whether we ever actually tendered any coal via such routing" (over the Eldorado connection with appellant) "or not." Eighty per cent of the coal mined at Dering mine No. 2 goes direct to Chicago (R. 368). Appellee's mining plant was erected in 1917 after the passage of the Illinois Public Utilities Act, which prohibits it from building a track from its mining plant to the railway of appellant because three highways and two railways intervene, so its location isolates it from being in fact or becoming a shipper on the railway of appellant. There is nothing shown by the evidence to distinguissh appellee as a shipper on the railway of appellee from any other mine owner with a plant located on any other railroad than that of appellant in the State of Illinois except distance, and the distance from appellee's plant to appellant's railway by the rails of the Illinois Central and by appellee's new track are practically the same, and we insist that the question is of principle and not distance.

(4) **The Track Appellant Has Connected With the Main Track of Its Railway by a Compelling Order of the Interstate Commission Is Shown by the Evidence Not to Be a Sidetrack Within the Meaning of Paragraph 9, Section 1 of the Interstate Commerce Act.**——This track is 2.9 miles in length (R. 285), is laid at grade across three pub-

lic highways and two public railways and is directly connected with the main track of the appellant under the order of the Interstate Commerce Commission and through a mine switch with the main track of the Illinois Central Railroad Company, both of which are public interstate and intrastate railways (R. 192, 193, 285). Over this track cars loaded and empty might be freely moved from the main track of appellant's railway to the main track of the railway of the Illinois Central Railroad Company and vice versa. It is so located and situated with private lands adjoining it on each side that other industries might be located upon it and spurs might be extended from it into the coal fields east and west of it. (See contracts quoted and R. 322, Map 339B.) It could be readily connected with the mine tracks of the Wasson mine No. 1, a half mile north of the connection with the railway of appellant (R. 208), and was built for that purpose (R. 219). It can be easily connected with the railway of the Southern Illinois Railway & Power Company at the connection, and that would extend it to all of the mines of appellant's railway (twenty-three in number), between Carrier Mills and Eldorado, and such connection and use is intended. (See contracts quoted.) Mr. Pauley expressly so testified (R. 381-382). It extends from an industry on another naturally competing railway to the railway of appellant, which industry (Dering Mine No. 2) is but 2.5 miles from the connection with the main track of appellant and its switch yards in Eldorado jointly used

by the Illinois Central (R. 367). It was built under contracts which give the Illinois Central and the Power Company the right to operate and use it perpetually, if option to acquire it be exercised, and until it shall be discontinued, at all event, to serve industries erected on it and to extend spurs from it and serve industries on such spurs or transport freight brought to it by either the Illinois Central or the Power Company destined to points on the other. One of the considerations to the Illinois Central is that it should have access to Wasson mine No. 1 (R. 219, 381, 382). It is provided by contracts that cars transported between Dering mine No. 2 and appellant's railway shall be subject to charge by the Power Company for such service at connecting line switching rates, and that both companies may operate the track under a track agreement held by the courts of Illinois to be a lease. It is denominated a "sidetrack" in the complaint (R. 85, Par. 4), and the language of paragraph 9, Section 1 of the Interstate Commerce Act, upon which the complaint was based, is "sidetrack," but the track construction bears no resemblance to a sidetrack in location, appearance, physical construction or the uses which it is intended to serve, or the manner in which it is to be operated. Photographic exhibits (399, 409) show this track to be of main-track construction, and Mr. Pauley testified that the track is to be equal to the main track of appellant and the Illinois Central (R. 355). It also appears from the testimony of appellee's engineers that it is in construction a first-class main track with

eighty-five-pound rail (R. 225, 233). We, therefore, contend that it is not a "sidetrack," and the Interstate Commerce Commission had no evidence before it to justify it in impliedly holding that it is a "sidetrack" by granting relief under the provisions of paragraph 9 of Section 1 of the Interstate Commerce Act.

(5) **The Track Is a Connecting Railway and an Extension of Railways.**——The facts we have just exhibited to establish that the location, situation, use and operation of this track are such that it is not in fact a sidetrack established affirmatively as a matter of fact, that it is a public railroad intended to be used by all persons having or hereafter establishing industries along its line or connected with it by spurs and is as related to existing railways with which it now or shall hereafter be connected in pursuance of the contracts under which it was built, an extension of their railways and separately considered as a distinct entity as a connecting railway to be operated under contracts which amount to a lease for the transportation of coal produced on the railway of the Illinois Central to the railway of appellant and vice versa, and all such traffic as the Illinois Central and the Power Company may find occasion to transport over it.

(6) **No Physical or Economic Fact Was Proven Which Could Have Induced the Interstate Commerce Commission to Order a Connection Between the Railway of Appellant and the Track of Appellee for the Purpose of Giving the Appellee a Status on Appellant's Railway.**——The dis-

tance to the Eldorado connection is but 2.5 miles; the adequacy of that connection and appellant's yards at Eldorado to receive and transport all there delivered from appellee's mine was established by the evidence and not questioned (R. 300). The Illinois Central has the largest number of local consuming markets for coal located on it, reaches the largest number of distributing markets, and has the greatest number of connections with other railways to remote points and populous centers (Exhibit XXXII, 432-434, and map following). No effort was made by appellee to get joint routes and rates from its mine (R. 207, 208), and its vice-president testified that he did not know of a shipment ever being offered over the Eldorado connection that was refused (R. 207, 208, 217).

(7) **Evidence Not Sufficient to Warrant the Order of the Interstate Commerce Commission Either Upon the Theory That the Track Is a Sidetrack or a Connecting Railway and an Extension of Railways.**——The evidence shows either one or two ultimate facts, that the track in question is either a sidetrack within the meaning of Par. 22, of Sec. 1, of the Interstate Commerce Act, or a connecting railway and an extension of railways within the meaning of pars. 18 to 21, of section 1 of that act. In the former case there was no proof that there was authority granted by the Illinois Commerce Commission to construct it as required by Sec. 45 of the Illinois Public Utilities Act. In

the latter there was no proof that a certificate of public convenience and necessity had been granted by the Interstate Commerce Commission, nor was there any evidence offered under which such a certificate could lawfully be granted.

(8) **Evidence Tending to Prove Service of the Illinois Central Inadequate and Appellee's Economic Need of Wider Market Immaterial.**——The complaint, in addition to stating the elements necessary to bring it within the provisions of paragraph 9, Section 1 of the Interstate Commerce Act, stated the economic needs of the complainant. The Examiner of the Commission, in opening the case for hearing, said:

> "In this complaint complainant asks that the defendant be required to cease and desist from violating the act and to construct, maintain and operate, on its own right of way, * * * a switch connection with the track of complainant under such reasonable terms and conditions as found justifiable, and to permit and to be permitted to accept coal tendered and delivered over this connection and to furnish cars for the movement to the best of its ability, without discrimination" (R. 180).

Counsel for appellant made substantially this statement: (1) That the statement made by the director is not a statement of the issues; (2) the real issue in this case is one not of service but of power and authority (a) of the

Dering Coal Company to own and control a railroad track which furnishes a connecting railway track which completes a connecting railway between two operating railroads; (b) whether the Dering Coal Company, located 2½ miles distant on the Illinois Central from a connection on that railroad with appellant, so that deliveries could be made from the Dering mines to the Big Four without the proposed track, is in a position to claim that it is an industry on the railway of appellant, entitled to the benefit of paragraph 9 of Section 1 of the Interstate Commerce Act; (c) whether the scheme devised by the Dering Company, through contracts entered into between it and the Illinois Central Railroad Company and it and the Southern Illinois Railway & Power Company to extend their rails through the construction of this connection, and, in pursuance of those contracts, for the operation of passenger and freight trains over said track and for the purpose of transporting coal from the Illinois Central to the Big Four and from Wasson Mine No. 1 on the Big Four to the Illinois Central, is not prohibited by the Illinois law requiring a certificate of convenience and necessity and the Interstate Commerce law requiring a certificate of convenience and necessity (R. 180, 181). After a statement of the issues the Examiner allowed the evidence to take a wide range in relation to the economic need of the appellee for a wider range of markets for its coal, and the physical reasons why the Illinois Central did not give

it better service, and the history of the operations of the Dering mine as compared with other mines in the Saline County district, all of which are totally irrelevant to any issue properly raised by either the complaint or the answer. This evidence, we insist, was all immaterial and quite aside from the questions involved, according to the contentions of the officers of the complainant. The thing appellee really wanted, according to the testimony of its vice president, was to indirectly get the benefit of being an industry on the railway of appellant without in fact being located upon its rails, the equivalent of a reciprocal switching arrangement.

II.

BRIEF OF ARGUMENT.

A Definite Statement of Points on Which Appellant Will Rely (R. 482).

The order and judgment of the District Court dismissing the complainant's bill should be reversed and the orders of the Interstate Commerce Commission should be set aside and held for naught:

(1) Because Paragraph G (or 9) of Section 1 of the Interstate Commerce Act was modified by Paragraphs 18 to 22 of Section 402 of the Transportation Act and a new policy established by which side, spur and industrial tracks (wholly within a single state), were completely excluded from the jurisdiction of the Interstate Commerce Commission and committed to the jurisdiction of the several states, and if the track in controversy is a sidetrack within the meaning of said paragraph G (or 9) the Interstate Commerce Commission had no jurisdiction to require its connection, maintenance or disconnection, and if not, no jurisdiction was conferred by the petition or complaint filed herein.

(2) Under the settled law and the facts of the record with all allowable inference in support thereof no case

is established by the evidence contained in the record for these reasons:

(a) The complainant was not a shipper on defendant's railway;

(b) The track is not a private sidetrack as alleged, but a connecting railway.

(3) The findings of the Commission are predicated upon immaterial facts, and the Commission omitted to make findings upon material issues presented by the pleadings and evidence.

(4) The record shows that the J. K. Dering Coal Company first elected to proceed under a similar statute of the State of Illinois to obtain a connection between the track here involved and the railway of appellant and relied upon substantially the same facts as are here involved. An adjudication of the issues in that case, therefore, is conclusive of the issues of material fact adjudicated as between the appellant and the Dering Coal Company in this proceeding as to the status, relations of the parties and the application of the laws of Illinois thereto, and the J. K. Dering Coal Company was in law estopped to proceed upon the same matter before the Interstate Commerce Commission, and, therefore, its petition should have been dismissed.

A.

THE INTERSTATE COMMERCE COMMISSION RIGHTLY HELD THAT IT HAD NO CONTROL OVER THE CONSTRUCTION OR ABANDONMENT OF A PRIVATE SIDETRACK LOCATED WHOLLY WITHIN A STATE, BUT WRONGFULLY THAT IT WAS NOT BOUND BY THE DECISION OF THE SUPREME COURT OF ILLINOIS CONSTRUING THE CONSTITUTION, STATUTES AND CONTRACTS UNDER WHICH SUCH TRACK WAS CONSTRUCTED TO DETERMINE WHETHER IT IS A PUBLIC OR A PRIVATE TRACK.

(a) Paragraph 22 of Section 1 of the Interstate Commerce Act provides:

> "The authority of the Commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction, abandonment of spur, industrial, team, switching or *sidetracks* located, or to be located, wholly within one state."
>
> 3 Mason's U. S. Code Annt., Title 49, p. 3489, Sec. 1, Par. 22.

(b) The Supreme Court of the United States, in construing this section, said:

> "It seems to be the contention of the company that since 85 per cent of the business done on the sidetrack is interstate commerce, the power to order its establishment or abandonment is vested in the Interstate Commerce Commission and that the state commission is without authority in the premises. *Such a claim is in the teeth of the Transportation Act of February 28, 1920, 41 Stat. at L. 456; Chap. 91, Sec. 402, Par. 22, Comp. Stat., Sec. 8563; Fed. Stat. Anno., Supp. 1920,*

p. 96, which provides that the authority of the Commission conferred by section 402 over the extension or abandonment of interstate railway lines shall not extend to the construction of spur, industrial or sidetracks. (See Railroad Commission v. Southern P. Co., 264 U. S. 331, 345, 68 L. ed. 713, 718, 44 Sup. Ct. Rep. 376.)

Western & Atlantic R. Co. v. Georgia Public Service Commission, 267 U. S. 497, 69 L. ed. 756.

(d) That a connection may be ordered under Paragraph 9 of Section 1 of the Interstate Commerce Act, and the complaint filed before the Interstate Commerce Commission by appellee, it must be a "private sidetrack." Abridged to express the scope covered by the complaint before the Interstate Commerce Commission, Paragraph 9 of Section 1 of the Interstate Commerce Act would read as follows:

> "Any common carrier subject to the provisions of this chapter (Title 49—Transportation), upon application of * * * any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such * * * 'private sidetrack' which may be constructed to connect with its railroad."

(e) Whether the track connected under the order of the Commission was in law a public or a private track was involved in the decision and order of the Interstate Com-

merce Commission and should have been controlled by the decision of the Supreme Court of Illinois construing the Constitution and laws of the state, not necessarily as to this particular track, but as to a track of its kind, as shown by evidence uncontroverted. As to whether public or private:

> "The highest court of the State of Alabama has given a construction to the act of the Legislature chartering this company, which we have seen is fatal to a recovery. It belongs to the state courts to expound their own statutes; and when thus expounded the decision is the rule of this Court in all cases depending upon the local laws of the state (7 Wheat. 361; 6 Peters 291)."

Smith v. Mernochen, 7 Howard 219, 13 L. ed. 675.

> "The federal courts are bound but follow the decisions of the highest courts of the state upon questions relating to the construction of the state Constitution and the validity thereunder of the state statutes, and where a state statute has been construed by the highest judicial tribunal of the state such construction is regarded as a part of the statute and is binding upon the federal courts as the text of the statute itself."

25 C. J., Sec. 171, p. 832.

(f) The words "shipper," "lateral branch line" and "private sidetrack" in Paragraph 9, Section 1 of the Interstate Commerce Act do not relate to what the structure

may become, but to what it must be at the time the complaint is filed.

"The words 'lateral branch line' do not refer to what the applicant may become or be by the order of the Commission, but to what it already is when it applies."

United States v. B. & O. S. W., 236 U. S. 18, 57 L. ed. 106.

B

THE PURPOSE OF ENACTING PARAGRAPHS 18 TO 22 OF SECTION 1 OF THE INTERSTATE COMMERCE ACT WAS TO PREVENT THE WASTEFUL CONSTRUCTION OF RAILWAYS AND THE EXTENSION OF RAILWAYS INTO NEW TERRITORY WHEN NOT NEEDED TO GIVE SERVICE TO THE PUBLIC AND WASTEFUL COMPETITION, AND ALTHOUGH A PARTICULAR CONSTRUCTION MAY HAVE MANY OF THE INDICIA OF A PRIVATE SIDE OR SPUR TRACK, IF IT IS BUILT INTO NEW TERRITORY ALREADY SERVED BY ANOTHER CARRIER AS A MEANS OF COMPETITION, IT IS WITHIN THE PROHIBITION OF THESE PROVISIONS.

(a) Though Owned by the Dering Company This Is a Track of the Illinois Central Railroad Company.——The nominal ownership of the track is immaterial.

"It has been frequently held by this Court that a railroad track, though used in connection with an industry on the line of the railway, is, as between the public and the railway company, a part of the railway, whether constructed by the railway company or the owner of the industry. In *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561, a bill was filed seeking to enjoin the laying of a railroad track upon the streets of the City of Peoria on the ground that it

was for a private use only, and that the streets of the city could not be used for private purposes. It was there said: 'The track defendant was authorized by ordinance to construct, when completed and attached to the principal track, is as much a "public highway," in the sense that term is used in the Constitution, as is the road of the company to which it is attached. * * * This track was laid, in a public street, under an ordinance of the city granting the privilege.' "

St. Louis, Springfield & Peoria R. R. v. Commerce Commission, 309 Ill. 621, at 625.

(b) After discussing whether a proposed spur track from the Missouri Pacific Railroad to a mine located on the railway of the Marion & Eastern Railroad Company was a side, spur or industrial track according to the facts, which were that the Missouri Pacific was merely extending the spur from its main track to a coal mine for the purpose of dividing the business of the coal mine and obtaining a share thereof for transportation, the Supreme Court of Illinois in a case subsequently approved by the Supreme Court of the United States in refusing to take it on a writ of certiorari said:

"Ordinarily, spur or industrial tracks are those which are used for the loading, reloading, storing and switching of cars and other services merely incidental to the regular train haul." (Citing a number of cases.)

(c) The Court then specified the determining factor as being that the Missouri Pacific Company was attempting to encroach upon a transportation territory occupied by the Marion and Eastern. It was said:

> "The new track, if built, will enter territory served by appellant, to and from which through routes and rates exist. While the answer avers that on the proposed track no line-haul rates will be established, nor regular continuous movements of trains made, nor a station erected, nor the billing of freight required, except through existing facilities, the effect of the construction of that track will be to afford railroad service in direct competition with appellant's road, on which, in connection with other railroads, through routes and rates have been established. The track, if laid, will be used in interstate as well as intrastate commerce. * * *
>
> "One of the reasons for the enactment of paragraph 18, above quoted, is to prevent the building of duplicate lines of railroad where an additional line will not serve the present or future public convenience and necessity but will add to the burden of maintenance, which the public will be required to pay (Detroit and Mackinaw Railway Co. v. Boyne City, G. & A. Railroad Co., supra.). Congress has expressly prohibited railroad companies subject to the Interstate Commerce Act from extending their lines without the consent of the Interstate Commerce Commission."
>
> Marion & Eastern R. R. Co. v. M. P. R. R. Co., 318 Ill. 436, at 443.

Missouri Pacific Railroad Company v. Marion & Eastern Railroad Company (No. 1009), Petition for Writ of Certiorari denied, citing 315 Ill. 477; 271 U. S. 661, 70 L. ed. 1137.

(d) On March 1, 1926, the Supreme Court of the United States definitely held the same as the Supreme Court of Illinois:

> "A truer guide to the meaning of the term 'extension and industrial track,' as used in Pars. 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act 1920. By that measure Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss. (See Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. Ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232; New England Divisions Case [Akron, C. & Y. R. Co. v. United States], 261 U. S. 184, 67 L. Ed. 605, 43 Sup. Ct. Rep. 270; Chicago Junction Case [Baltimore & O. R. Co. v. United

States], 264 U. S. 258, 68 L. Ed. 667, 44 Sup. Ct. Rep. 317; Railroad Commission v. Southern P. Co., 264 U. S. 331, 68 L. Ed. 713, 44 Sup. Ct. Rep. 376.) The act sought, among other things, to avert such losses."

Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U. S. 266, at 277, 70 L. Ed. 583.

(e) Referring to a similar statute enacted in Illinois prior to the enactment of Paragraphs 18 to 21 of the Interstate Commerce Act, the Supreme Court of Illinois, pointing out the method of relief from complaints such as those made by appellee, said:

"The statute (the Public Utilities Act) provides the means of compelling the existing transportation system to provide adequate service for the public. If the people living in the territory through which the Aurora, Elgin and Chicago Railroad operates are not being properly served they can file a complaint with the Commerce Commission, which has the power to order whatever change or increase in service the evidence warrants. If the existing transportation company does not comply with the Commission's order, then a situation may arise where the public convenience and necessity will require the establishment of another system. The theory of the Public Utilities Act is to provide the public with efficient service at a reasonable rate by compelling an established carrier occupying a given field to provide adequate service and at the same time to protect the existing utility from ruinous competition

(West Suburban Transportation Co. v. Chicago and West Towns Railway Co., ante, p. 87, 309 Ill.). By this method the public is protected from paying the cost of the operation of competing systems and a return upon double the investment of capital."

Choate v. Commission, 309 Ill. 256.

C.

APPELLEE IS A PRIVATE CORPORATION OF ILLINOIS WITHOUT CHARTER POWER TO BUILD, OWN, LEASE, MAINTAIN OR OPERATE A RAILROAD AND IS PROHIBITED BY SECTIONS 55 AND 58 OF THE ILLINOIS PUBLIC UTILITIES LAW FROM LAYING A PRIVATE RAILROAD TRACK ACROSS A PUBLIC HIGHWAY, OR A PUBLIC RAILWAY.

(a) A private corporation is not within the provisions of the Public Utilities Act; it only confers power to be exercised by public utilities and the appellee is not a public utility.

"A coal corporation is not a public utility" (Public Utilities Act, Sec. 10), "but is a private enterprise. It possesses no charter powers to build a railroad."

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Commerce Commission, 315 Ill. 477.

(b) Section 10 of the Public Utilities Act, among other things, provides:

"The term 'public utility,' when used in this act, means and includes every corporation, company, as-

sociation, joint stock company or association, firm, partnership or individual, their lessees, trustees or receivers appointed by any court whatsoever (except, however, such public utilities as are or may hereafter be owned or operated by any transportation district or other municipality, and except such telephone company or companies which are or may hereafter be purely concerns having no rates or charges for services, but paying the operating expenses by assessment upon the members of such company or companies and no other person or persons) that now or hereafter:

"(a) May own, control, operate or manage, within the state, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons or property or the transmission of telegraph or telephone messages between points within this state; or for the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity or water; or for the conveyance of oil or gas by pipe line; or for the storage or warehousing of grain; or for the conduct of the business of a wharfinger; or that

"(b) May own or control any franchise, license, permit or right to engage in any such business.

"The term 'common carrier,' when used in this act, includes all railroads, street railroads, express companies, private car lines, sleeping car companies, fast freight lines, steamboat lines and other common carriers by water, and every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees or receivers appointed by any court whatsoever, owning,

operating or managing any such agency for public use in the transportation of persons or property within the state."

1925 Cahill's Ill. Stat., Chap. 111a, Sec. 10, p. 1891.

(c) Section 55 of the Public Utilities Act, conferring authority upon railroads to construct a new track across a public highway, prohibits its doing so without a certificate of public convenience and necessity. Section 55 of said act, among other things, provides:

"No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

"No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this state and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this act goes into effect, shall transact any business in this state until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

"Whenever after a hearing the Commission determines that any new construction or the transaction

of any business by a public utility will promote the public convenience and is necessary thereto it shall have the power to issue certificates of public convenience and necessity.

"Such certificates may be altered or modified by the Commission, upon its own motion or upon application by the person or corporation affected. Unless exercised within a period of two years from the grant thereof authority conferred by a certificate of convenience and necessity issued by the Commission shall be null and void.

"No certificate of public convenience and necessity shall be construed as granting a monopoly or an exclusive privilege, immunity or franchise."

1925 Cahill's Ill. Stat., Chap. 111a, Sec. 55, p. 1902.

(d) And a private corporation cannot build such a track for its use.

C. C. C. & St. L. Ry. Co. v. Ill. Comr. Com., 315 Ill. 461, at 474;
St. L. Springfield & Peoria R. v. Ill. Comr. Com., 309 Ill. 625.

(e) The Public Utilities Act of Illinois expressly prohibits the laying of any railroad track across a public highway without the consent of the Public Utilities Commission and confers no power to authorize the laying of such a track by a private corporation.

Section 58 provides:

"No public road, highway or street shall hereafter be constructed across the track of any railroad company at grade, nor shall the track of any railroad company be constructed across a public road, highway or street at grade, nor shall the track of any railroad company be constructed across the track of any other railroad or street railroad company at grade, nor shall the track of a street railroad company be constructed across the track of a railroad company at grade without having first secured the permission of the Commission: *Provided*, that this section shall not apply to the replacement of lawfully existing roads, highways and tracks. The Commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe. The Commission shall have power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each such grade crossing."

1925 Cahill's Ill. Stat., Chap. 111a, Sec. 58, p. 1903.

(f) Even a railroad cannot exercise the right of eminent domain for a track not needed as a facility of the railroad for the purpose of extending a track into an industry.

Litchfield & Madison v. Alton & Southern R. Co., 305 Ill. 388, 395.

(g) A track cannot be laid in, upon or across a public highway or a railroad in such way as that it is possible for the public to use it by a corporation having no right to own, use and operate such track for the benefit of the public, and a track so located and connected with a railroad becomes the track of the latter.

Truesdale v. Peoria Grape Sugar Co., 101 Ill. 567;
Chicago Dock Co. v. Garrity, 115 Ill. 55;
McGann v. People, 194 Ill. 526;
Public Utilities Commission v. Smith, 298 Ill. 159;
St. Louis, Springfield & Peoria R. R. v. Illinois Commerce Commission, 309 Ill. 621, at 625.

In the latter case it is said:

"It has been frequently held by this Court that a railroad track, though used in connection with an industry on the line of the railway, is, as between the public and the railway company, a part of the railway, whether constructed by the railway company or the owner of the industry. In Truesdale v. Peoria Grape Sugar Co., 101 Ill. 561, a bill was filed seeking to enjoin the laying of a railroad track upon the streets of the City of Peoria on the ground that it was for a private use, only, and that the streets of the city could not be used for private purposes. It was there said: 'The track defendant was authorized by ordinance to construct, when completed and attached to the principal track, is as much a 'public highway,' in the sense that term is used in the Constitution, as is the road of the company to which

it is attached. * * * This track was laid, or is to be laid, in a public street, under an ordinance of the city granting the privilege."

St. Louis, Springfield & Peoria R. R. v. Commerce Commission, 309 Ill. 621, at 625.

D.

APPELLANT'S TRACK BEING A STRUCTURE OVER WHICH THE INTERSTATE COMMERCE COMMISSION HAS NO JURISDICTION, THE DECISIONS OF THE SUPREME COURT OF ILLINOIS MUST DETERMINE ITS CHARACTER AS PUBLIC OR PRIVATE.

(a) The appellant's track having been constructed under the laws of Illinois by an Illinois corporation, is a public or private track as determined by Illinois law, and being located across public highways and connected with public railways, is a public and not a "private" track.

St. Louis, Springfield & Peoria R. R. v. Illinois Commerce Commission, 309 Ill. 621, at 625;
C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 461, at 474;
Public Utilities Commission v. Smith, 298 Ill. 159.

E.

APPELLEE IS NOT A SHIPPER ON THE RAILWAY OF APPELLANT WITHIN THE MEANING OF PARAGRAPH 9, SECTION 1, OF THE INTERSTATE COMMERCE LAW.

(a) Paragraph 9 of Section 1 of the Interstate Commerce Law is as follows:

"*Any common carrier subject to the provisions of this chapter*, upon application of any lateral, branch

line of railroad, or of *any shipper tendering interstate traffic for transportation*, shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad *or private sidetrack which may be constructed to connect with its railroad*, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper."

3 Mason's U. S. Code Annt. 1926, Vol. 3, p. 3487, Title 49, Sec. 1, Par. 9.

(b) Appellant is not so situated that it can claim the benefit of Paragraph 9 of Section 1 of the Interstate Commerce Act. In determining the rights of appellant the Supreme Court of Illinois said:

"An examination of the plat discloses that the coal company's mine is not on the Big Four and cannot be considered an industry on that road."

C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 469.

(c) In Dering Mines Company v. Director General, etc., 62 I. C. C. 265, it was said:

"The complainants operate two local mines, the Dering Mine No. 3, situated on the Big Four, .8 mile

northeast of Eldorado, and the J. K. Dering Coal Company Mine No. 2, situated on the Illinois Central Railroad, 2.5 miles west of Eldorado. The complainants ask that the Illinois Central shall serve the mine on the Big Four, and that the Big Four shall serve the mine on the Illinois Central, under trackage agreements or switching absorption arrangements, and thereby make their mines joint mines. • • •

"The advantage which would accrue to the complainants if they should prevail would be a better car supply in times of car shortage, due to the opportunity they would then have to draw cars from both lines, and additional route to Chicago and other points reached by both lines, and access by each mine to local markets on both lines instead of only the local markets on its one line, as at present."

(d) The Commission refused this application on the theory that No. 3 was an industry on the line of the Big Four and No. 2 an industry on the line of the Illinois Central, followed a former case, and said:

"We there found, in substance, that the service of a mine by a carrier under a trackage agreement is, in practical and legal effect, the substantial equivalent of an extension of its rails to the mine."

Dering Mines Company v. Director General, etc., 62 I. C. C. 265.

(e) The case referred to by the Dering Mines case is

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Dering Mines Company v. Director General, etc., 62 I. C. C. 265.

(e) The case referred to by the Dering Mines case is

Ridge Coal Mining Company v. Missouri Pacific, in which it was said:

> "It appears that substantially all the existing trackage agreements of the Burlington were entered into at a time when the carriers were actively competing for additional business. The Burlington objects to further extensions of its service to mines not on its rails on the ground that, during periods of car shortage, it is unable to provide an adequate supply of equipment for shippers to whom it already owes an obligation to furnish transportation.
>
> "It is our view that the service of such mines by the Burlington under trackage agrements is, in practical and legal effect, the substantial equivalent of the extension of its rails to them (Commercial Club of Superior, Wis., v. G. N. Ry. Co., 24 I. C. C. 96; Penick & Ford v. Director General, 61 I. C. C. 173).
>
> "The equality in treatment among shippers which the law requires of a carrier extends only to shippers whom it is under a duty to serve, and the Burlington owes no such duty to the complainant. A railroad must be allowed some latitude for the exercise of business judgment and discretion in determining the scope of its operations, having due regard for the provisions of the Interstate Commerce Act. Under paragraph 21 of section 1 of the act we may require a carrier to extend its line only when the extension is reasonably required in the interest of public convenience or when the expense involved will not impair the ability of the carrier to perform its duty to the public. Paragraph 22 of the same section provides that the authority granted by paragraph 21

shall not extend to spur, industrial, team, switching or side tracks located or to be located wholly within one state."

Ridge Coal Mining Company v. M. P. R. R. Co., 62 I. C. C. 259, at 260.

F.

APPELLANT'S TRACK IS NOT A SIDETRACK WITHIN THE MEANING OF PARAGRAPH 9, OF SECTION 1, OF THE INTERSTATE COMMERCE ACT.

(a) The evidence does not bring it within the description of such a track as found by the courts. The Supreme Court of Illinois said:

"Each case must rest largely upon its own facts."
C. C. C. & St. L. Ry. Co. v. Commerce Commission, 315 Ill. 469.

In the case of Detroit & Mackinaw Ry. Co. v. Boyne City R. R. Co., it was held that the term "spur tracks," as distinguished from extensions and connecting new lines as used in the Transportation Act, was held to mean tracks used for loading, reloading, storing and switching cars merely incidental to the regular train haul, while the latter are tracks over which there are to be train movements in the sense that such movements are actually transportation hauls from the shipper to the consignee.

Detroit & Mackinaw Ry. Co. v. Boyne City R. R. Co., 286 Fed. 540.

In the case of Marion & Eastern Railroad Company v. M. P. R. R. Co., the Supreme Court of Illinois said:

> "Ordinarily, spur or industrial tracks are those which are used for the loading, reloading, storing and switching of cars, and other services merely incidental to the regular train haul (Detroit & Mackinaw Railway Co. v. Boyne City, G. & A. Railroad Co., supra; Akers v. United New Jersey Railroad Co., 43 N. J. L. 110)."

Then followed a description of the proposed track and the specification of a test thought by the Supreme Court of Illinois to be conclusive. It was said:

> "The proposed track, according to the answer of the Missouri Pacific Railroad Company, will be more than a mile in length, and will run from its line to a coal shaft under construction by the West Virginia Coal Company. Appellant has already constructed a switch track to this new shaft, with the exception of the mine track, for which the material was on the ground. The new track, if built, will enter territory served by appellant, to and from which through routes and rates exist. While the answer avers that on the proposed track no line-haul rates will be established, nor regular continuous movements of trains made, nor a station erected, nor the billing of freight required, except through existing facilities, the effect of the construction of that track will be to afford railroad service in direct competition with appellant's road, on which, in connection with other railroads, through routes and rates have been

established. The track, if laid, will be used in interstate as well as intrastate commerce. It will be an extension of the line of the Missouri Pacific Railroad, rather than a spur, industrial, team, switching or sidetrack, as defined in Paragraph 22 of Section 1 of the Interstate Commerce Act.

"One of the reasons for the enactment of paragraph 18, above quoted, is to prevent the building of duplicate lines of railroad where an additional line will not serve the present or future public convenience and necessity, but will add to the burden of maintenance, which the public will be required to pay" (citation). "Congress has expressly prohibited railroad companies subject to the Interstate Commerce Act from extending their lines without the consent of the Interstate Commerce Commission."

Marion & Eastern R. R. Co. v. M. P. R. R. Co., 318 Ill. 443;
Missouri Pacific R. R. Co. v. Marion & Eastern R. R. Co., 271 U. S. 661, 70 L. ed. 1137.

In the case of Texas & Pacific v. Gulf C. & S. F. R. Co., the Supreme Court of the United States, in determining whether the Hale Cement Line was a spur in the sense in which that word is commonly used, reviewed the various indicia shown by the evidence, and after reviewing the various contentions in the evidence said:

"A truer guide to the meaning of the terms 'extension and industrial track,' as used in paragraphs 18 to

22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by the Transportation Act 1920."

And then proceeded to hold that a new policy had been established, and for the reason that the proposed line would encroach upon territory already served by another railroad it should be held to be not a side, spur nor industrial track within the meaning of the Interstate Commerce Act.

Texas & Pacific R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 277, 70 L. ed. 583.

G.

THE TRACK OF THE APPELLEE IS NOT A PRIVATE SIDE-TRACK BUT A PUBLIC INTERSTATE RAILWAY WHICH NEITHER THE ILLINOIS CENTRAL RAILROAD COMPANY NOR APPELLANT HAD THE RIGHT TO BUILD WITHOUT A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED BY THE INTERSTATE COMMERCE COMMISSION.

(1) It is a public railway: either an extension of railways or a new connecting railway, or both, as a matter of fact shown by uncontroverted evidence.

(2) It is within the meaning and intent of Pars. 18 to 22, of Section 1, of the Interstate Commerce Act, an extension of railways of a new railway which could not be lawfully built without a certificate of public convenience and necessity issued by the Interstate Commerce Commis-

sion. The part of Pars. 18 to 20, Section 1, of the Interstate Commerce Act applicable is abridged as follows:

> "• • • no carrier by railroad subject to this act shall undertake the extension of its line of railroad, • • • unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction • • • of such • • • extended line • • •."

Paragraph (22):

> "The authority of the Commission (so) conferred • • • shall not extend to the construction • • • of spur, industrial, team, switching or sidetracks, • • • to be located wholly within one state • • •."

Paragraph (20):

> "Any construction • • • construction • • • contrary to the provisions • • • of paragraph (18) • • • may be enjoined by any court of competent jurisdiction at the suit of • • • any party in interest."

> Transportation Act (Feb. 28), 1920, Chap. 91, Sec. 402, 41 Stat. at L. 456, 477, 478, Comp. Stat. Sec. 8563, Fed. Stat. Anno. Supp. 1902, p. 96.

The Supreme Court of Illinois held that appellant's track upon the admitted facts of this case considered

upon review of orders of the Illinois Commerce Commission made under authority of a statute in substance the same as Paragraph 9, of Section 1, of the Interstate Commerce Act, is controlled by Paragraphs 18 to 20 of Section 1, of the Interstate Commerce Act.

(a) The Illinois statute is as follows:

> "Every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, or of any corporation, person or municipal corporation owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover: Provided, that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company.
>
> "Under the conditions specified in the above proviso every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, shall construct upon its right of way a spur or spurs

for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby."

1925 Cahill's Ill. Stat., Chap. 111a, Sec. 45, p. 1899.

(b) The Supreme Court of Illinois said:

"The first question involved in this case is whether or not this track, when constructed, would be a spur track, or, in fact, a railroad extension. If the former, jurisdiction lies in the Illinois Commerce Commission to enter the orders entered herein, provided the evidence shows a proper case; if the latter, the Commission has no jurisdiction, as jurisdiction over such matters is vested in the Interstate Commerce Commission by the Federal Transportation Act."

The Court then reviewed the material facts, stating the conclusive facts first:

"An examination of the plat discloses that the company's mine is not on the Big Four, therefore, cannot be considered an industry on that road. It is also shown by the plat and the evidence that the proposed road is over three and one-half miles in length, while the distance from the Coal Company's mine to the Big Four at Eldorado is about two and one-half miles. Whether this track is a spur track or a connection between two or more railroads and an extension of one or all depends upon the use to which it is adapted."

Then quoting definitions of spur, side and industrial tracks and quoting from the case of Detroit & Mackinaw Ry. Co. v Boyne City Railroad, 286 Fed. 540, and continuing:

> "The question then arises whether or not this track would, in effect, be an extension of any of these railroads. Under paragraphs 18 to 22, of section 1, of the Interstate Commerce Act (24 Stat. at Large 379), commonly called the Transportation Act, no extension of railway lines can be built or operated thereon without a certificate of convenience and necessity from the Interstate Commerce Commission, and if the construction and connection of this proposed track amount to an extension of a railway line, within the meaning of the Transportation Act, the building of such a track and the connection here sought are matters over which the Illinois Commerce Commission does not have jurisdiction, sole jurisdiction in such matters being vested in the Interstate Commerce Commission."

Then following:

> "In *Ridge Coal Mining Co. v. Missouri Pacific Railroad Co.*, 62 I. C. C. 259, the complainant mining company sought by petition before the Interstate Commerce Commission to require the Chicago, Burlington and Quincy Railroad Company and the Missouri Pacific Railroad Company to accord to the complainant the status of a joint mine. Complainant's mine was located on the Missouri Pacific railway system. It was alleged that the Chicago, Burlington and Quincy

had, by trackage agreements, extended its service to a number of mines competitive with the complainant which it did not reach over its own rails, and that the complainant would be unduly prejudiced if it were not likewise given a joint mine status. The trackage agreements referred to were shown to have been made before the passage of the Transportation Act. The Interstate Commerce Commission in that case, in denying the petition, held that service by the Chicago, Burlington and Quincy under a joint mine status or trackage agreements to mines not on its line, was in legal effect the substantial equivalent to the extension of its rails to such mines, and that such could not be required without a certificate of convenience and necessity, citing Commercial Club v. Great Northern Railway Co., 24 I. C. C. 96, and Penick & Ford v. Director General, 61 id. 173. It will be noted that there was, in that case, no attempt to force an actual physical connection with the railroad, but to secure joint mine privileges to a mine not on the Chicago, Burlington and Quincy.

"It would seem clear under these holdings that whether such connection is a joint mine status by trackage agreement or by order of the Interstate Commerce Commission, or is an actual physical connection by bringing a track to the right of way of the road sought to be connected, the result is the same. Both constitute an extension of the latter road to an industry not on its line and are matters within the exclusive control of the Interstate Commerce Commission under the Transportation Act. While rulings of the Interstate Commerce Commission are not binding on this court, we think them particularly persuasive here, where the matter of this railroad con-

nection is bound up with the whole subject of interstate traffic, of which that Commission has jurisdiction.

"It appears that the coal company, prior to the institution of the proceedings herein, sought by petition before the interstate Commerce Commission, against the Illinois Central and the Big Four, to secure an order declaring a joint mine status as to its mines (Dering Mines Co. v. Director General, I. C. C. No. 10,945). At that time it was operating a mine on the Big Four eight-tenths of a mile northeast of Eldorado, known as mine No. 3, together with the mine involved in this proceeding. The petition alleged that failure on the part of the Big Four and the Illinois Central to accord such status resulted in unjust discrimination against the petitioner. The Big Four alone defended against the petition. The evidence showed that it had expended over $16,000,000 in improving its facilities and providing equipment for handling coal traffic in the Southern Illinois coal fields, and that it desired to use its equipment and facilities in the service of shippers to whom it was already under obligations. The Interstate Commerce Commission denied the petition, holding that, in effect, service to a mine not on the line of a carrier was the substantial equivalent of an extension of its rails to the mine, and that under the *Ridge Coal Mining Co. Case*, supra, such should not be ordered except in case of public convenience and necessity and where the added burden would not work hardship on the road or its patrons.

"Appellant argues that the proceedings in the two petitions under consideration here are but attempts to secure indirectly through this forced connection what

the coal company failed to secure in its proceeding before the Interstate Commerce Commission just referred to, and that the fact that the Illinois Central did not defend in the petition before the Interstate Commerce Commission and is one of the petitioners in petition No. 12,819 under a contract with the coal company indicates that this is an attempt to secure an extension of the line of the Illinois Central without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission. Regardless of the motives of the parties, we see no substantial difference, in effect, between the thing sought in the *Ridge Coal Mining Co. Case* and the case just referred to on the one hand, and the petitions under consideration here on the other. Both petitions in this case must be held to have been filed for a single purpose. Both seek, in effect, one thing, and that is one under the sole jurisdiction of the Interstate Commerce Commission, and is therefore one of which the Illinois Commerce Commission has no jurisdiction.

"But appellees urge that the contract for use of the proposed track cannot be carried out because of the limitation in the order of the Commission that it shall be used only for the purpose of hauling the coal of the Coal Company unless the consent of the Commission is had, and that therefore the track can be considered nothing more than a private spur-track. Regardless of the contract, it is well settled in this state that a railway track built and connected as here proposed becomes thereby a part of the public railway highways of the state, free and open to the use of the public (St. Louis, Springfield and Peoria Railroad v. Commerce Com., 309 Ill. 621; Public Utilities Com. v. Smith, 298 id. 151). It would, when

built, be open to the use of any and all shippers upon adjustment by the Commission of the proportionate cost thereof. The limitations in the orders of the Commission are therefore of no avail."

C. C. C. & St. L. Ry. Co. v. Commerce Commission, 315 Ill. 461, at 472.

(c) In another Illinois case in which the facts tending to establish the new construction which was alleged to be an extension of a railway and was, therefore, enjoined at the suit of the railway into whose territory the extension was projected, the principles established by C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 461, were applied and followed by the Illinois Supreme Court, and that case came before the Supreme Court of the United States on a petition for a writ of certiorari, which was denied, and the principle established by the Illinois Court permitted to stand as the law. In that case the fact upon which the case turned was that the extension was from one railroad into territory already occupied by another competing railroad. In that case a temporary injunction was granted upon the filing of the bill. The defendant moved to dismiss the bill and vacate the order. The motion was denied. The defendant railroad company then answered the bill. In its answer it averred that the proposed extension would constitute a spur or industrial, 58,980 feet in length, to run from an existing spur on the line of the West Virginia Coal Company's mines to a new shaft

of the same company which was under construction. That no spur, industrial or other railroad track now serves the new mine shaft; that the only traffic which would move from the proposed track would be coal and supplies to and from the new shaft of the Coal Company, and that no other shipper would be served thereby; that no regular continuous train movement would be made over or passenger trains operated on the track; that no line-haul rates would be established or charged for traffic thereon, and no station, either for the accommodation of freight or passengers, would be built on the proposed extension; that the use of the new track would require no billing of freight to and from the mine other than that made at Bush Station; that this station is the terminal point of the Missouri Pacific Railroad at which the West Virginia Coal Company's shipments would originate and be billed for road-haul movements by other continuous transportation service, and that the spur would be used solely for loading, unloading, switching and other purposes connected with an incident to such service. The answer denied that, by the Interstate Commerce Act, or any other law, the Missouri Pacific Railroad Company was required to give notice of the construction of the proposed track, or that the track, if constructed, would cause irreparable damage to complainant. It denied that the new shaft of the Coal Company is served by the complainant, or any other railroad, and denied that for the purpose of constructing and operating the track a certificate of public convenience and

necessity, or other express authority, was required, and the answer was verified. A hearing followed at which only the complainant offered evidence. Its president testified that the Marion & Eastern Railroad extends from Marion in a northeasterly direction through the east half of Williamson County. It was built to develop that part of the county and give it railroad service; that connections are made with trunk lines at Marion; that in 1922 laid a switch track near the point where the shaft of the West Virginia Coal Company was to be sunk. The ties, rails and other material for the mine track were delivered on the ground. The West Virginia Coal Company then directed the complainant not to proceed with the construction of the main track, because the Coal Company would not at that time sink the shaft, and nothing further was done. The proposed track of the Missouri Pacific Railroad will reach the complainant's railroad near mile post No. 2, in the vicinity of Scranton Station. There are no coal mines at the point. A shaft is about to be sunk approximately 700 feet west of complainant's track, or about 200 feet from the switch track, which it constructed in 1922. Mines are under development east of the track and complainant purchased right of way into that territory to Crab Orchard. The witness had been over the route of the track proposed to be laid by the Missouri Pacific Railroad Company, and he had followed the stakes to the east of complainant's line. Complainant had laid its tracks from Scranton Station west to where the proposed mine

was to be opened. Through routes and joint rates from Scranton Station through Marion to coal-consuming markets were maintained by complainants in connection with the Missouri Pacific Railroad Company, the Illinois Central Railroad Company and the Chicago & Eastern Illinois Railroad Company. The witness was asked what effect the proposed extension would have upon complainant's road in a competitive sense. An objection to that question was sustained, the Court stating that it did not seem to be material. An employe of complainant testified that he saw stakes running west from its track in the vicinity of Scranton Station and also one east of the track, but it had since been removed. He testified that he saw a construction camp at the same place. At the conclusion of the testimony on behalf of the complainant the defendants moved to dismiss the bill to vacate the restraining order and vacate the injunction, which was done, and an appeal followed to the Supreme Court. The Supreme Court of Illinois, discussing the character of this track and emphasizing that its purpose was to invade the territory occupied by the complainant, the Marion & Eastern Railroad Company, reversed the Circuit Court under authority of the case of C. C. C. & St. L. Ry. Co. v. Commerce Commission, 315 Ill. 461, and the cases cited in the opinion of that Court, and said.

> "Appellant has already constructed a switch track to this new shaft, with the exception of the mine track, for which the material was on the ground. The new

and that when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss. (See Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232; New England Divisions Case [Akron, C. & Y. R. Co. v. United States], 261 U. S. 184, 67 L. ed. 605, 43 Sup. Ct. Rep. 270; Chicago Junction Case [Baltimore & O. R. Co. v. United States], 264 U. S. 258, 68 L. ed. 667, 44 Sup. Ct. Rep. 317; Railroad Commission v. Southern P. Co., 264 U. S. 331, 68 L. ed. 713, 44 Sup. Ct. Rep. 376.) The act sought, among other things, to avert such losses.

"When the clauses in pars. 18 to 22 are read in the light of this congressional policy the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side-tracks * * * to be located wholly within one state.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the

new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory the proposed trackage constitutes an extension of the railroad within the meaning of par. 18, although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the Federal Commission issues its certificate that public necessity and convenience require its construction. The Hale-Cement Line is clearly an extension within this rule."

Texas & P. R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 277, 70 L. ed. 583;
R. R. Com. v. C. B. & Q. R., 257 U. S. 563, 590, 66 L. ed. 384;
Ala. & V. R. Co. v. Jackson & E. R. Co., 271 U. S. 248, 70 L. ed. 928, 930.

(e) Considering the history, object and purpose of paragraph 9, Sec. 1, under which this proceeding was instituted, entirely aside from the later provisions of the Transportation Act, it was held in determining whether a certain track was a lateral or branch line within the meaning of the act that

"it is plain from the provisions of the act, the history of the amendment and justice that the object was not

to give a roving commission to every road that might see fit to make a descent upon a main line, but primarily at least to provide for shippers seeking an outlet either by private road or a branch."

Interstate Commerce Commission v. D. L. & W. R. Co., 216 U. S. 537, 54 L. ed. 607.

II.

APPELLEE'S TRACK WITH RESPECT TO INTRASTATE COMMERCE IS A PUBLIC TRACK AND A PART OF THE RAILWAY SYSTEM OF ILLINOIS, THEREFORE, DOES NOT MEET THE REQUIREMENT AND DEFINITION OF PARAGRAPH 9, SECTION 1, OF THE INTERSTATE COMMERCE ACT, WHICH ONLY AUTHORIZES CONNECTION WITH A PRIVATE SIDETRACK.

(a) By the contracts under which it was built it is made a public track.

(b) By the understanding and agreement of the parties and the object to be attained it is to be operated as a public track.

(c) By the Constitution and laws of the State of Illinois it is made a public track.

Public Utilities Commission v. Smith, 298 Ill. 159;
St. Louis, Springfield & Peoria Railroad v. Illinois Commerce Commission, 309 Ill. 621;
C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 318 Ill. 461.

I.

CONSIDERED MERELY AS A SIDETRACK CONNECTED WITH AN INTRASTATE RAILROAD APPELLEE'S TRACK IS A PUBLIC AND NOT A PRIVATE SIDE OR SPUR TRACK AND IS OPEN AND FREE TO THE USE OF THE PUBLIC AS A PART OF THE RAILWAYS WITH WHICH IT CONNECTS. AND, THEREFORE, IS NOT WITHIN THE AUTHORITY AND DEFINITION OF PARAGRAPH 9, OF SECTION 1, OF THE INTERSTATE COMMERCE ACT AND NO SWITCH CONNECTION COULD LAWFULLY BE ORDERED BETWEEN IT AND THE RAILWAY OF APPELLANT.

(a) Under the evidence it would be a facility of the Illinois Central, Southern Illinois Railway & Power Company and appellant, and no facility of a railroad can be built without a certificate of public convenience and necessity from the Illinois Commerce Commission.

> "No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility, or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction."
>
> 1925 Cahill's Ill. Stat., Chap. 111 (a), Sec. 55, p. 1902.

(b) This track, when connected, would be available to use by landowners on either side of it and by those who might reach it by public highways and by the parties to the contracts and all other persons who might reach it over their railways or from spurs extended from it as a

part of the public railway highway of the state, and it is, therefore, a public track.

Public Utilities Commission v. Smith, 298 Ill. 159;
St. Louis, Springfield & Peoria Railroad v. Illinois Commerce Commission, 309 Ill. 621;
C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 461.

J.

THE FACTS FOUND BY THE SUPREME COURT OF ILLINOIS ESTOPPED DEFENDANTS TO ALLEGE ANYTHING TO THE CONTRARY THEREOF IN THE PROCEEDING BEFORE THE COMMISSION.

Rule of Estoppel Is of Universal Application.

(a) It is a settled principle that where a point or matter is adjudicated between the same parties, or some of the same parties and the privies of the other, the matter thus adjudicated is conclusive between them in any subsequent suit where the same point or matter is sought to be put in question. As said by Bigelow on Estoppel:

"The class of cases now to be considered is that in which an estoppel arises regardless of any identity in the cause of action; the only requirement now being that the point in issue, as distinguished from the whole cause of action, shall be identical in the two cases. In these cases the judgment operates as an estoppel in regard to those matters in controversy upon which, or upon the determination of which, the

verdict or finding, as distinguished from the judgment itself, was rendered."

Bigelow on Estoppel (4th Ed.) 83;
Cromwell v. Sac, 94 U. S. 350;
Davis v. Brown, 94 U. S. 423;
Hanna v. Read, 102 Ill. 596;
Tilley v. Bridges, 105 Ill. 336;
New Orleans v. Citizens Bank, 167 U. S. 395, 42 L. ed. 210.

This rule is applicable to the decisions of boards, commissions and courts of limited and special jurisdiction, and to public officers required to exercise judgment and decide issues.

24 Ency. of L., pp. 723, 820.

(b) "A judgment at law, in any form of action, is conclusive upon the parties upon all questions, titles and rights involved in the litigation and passed upon by the Court, which the Court had power and jurisdiction to hear and determine, and nothing more; and when the same questions or the same rights or titles are again drawn in issue, whether in a court of law or equity, between the same parties or their privies, the previous adjudication will be regarded as conclusive upon them."

Hawley v. Simons, 102 Ill. 115.

(c) "When some specific fact or question has been adjudicated and determined in a former suit,

and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit without regard to whether the cause of action is the same in both suits or not. This is known as an estoppel by verdict and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by the defendant as a matter of defense."

Hanna v. Read, 102 Ill. 596.

(d) This rule was applied by the United States Supreme Court, in Cromwell v. Sac County, as follows:

"For example: A judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy.

Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action—not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

"The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus, in the case of *Outram v. Morewood*, 3 East 346, the defendants were held estopped from averring title to a mine, in an action of trespass for digging out coal from it, because, in a previous action for a similar trespass, they had set up the same title and it had been determined against them. In commenting upon a decision cited in that case Lord Ellenborough, in his elaborate opinion, said:

"'*It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel.* The recovery of itself in an action of trespass is only a bar to the future recov-

ery of damages for the same injury; *but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.*'

"And in the case of *Gardner v. Buckbee*, 3 Cow. 120, it was held by the Supreme Court of New York that a verdict and judgment in the Marine Court of the City of New York, upon one of two notes given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were conclusive upon the question of the character of the sale in an action upon the other note between the same parties in the Court of Common Pleas. The rule laid down in the celebrated opinion in the case of *The Duchess of Kingston* was cited, as follows:

"'That the judgment of a court of concurrent jurisdiction directly upon the point is as a plea of bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court.'"

Cromwell v. Sac County, 94 U. S. 350, 24 L. Ed. 198.

(c) That the decision of a state court relates to rights sought to be exercised under a grant from the Federal Government makes no difference. The rule is the same and the decision of the highest court in the state is alike binding in that event. This principle was applied to condemnation proceedings to obtain land upon which to con-

struct approaches to a bridge built over a navigable river under the provisions of an Act of Congress.

Stone v. Southern Ill. & Mo. B. Co., 206 U. S. 269, 51 L. ed. 1059.

(f) The rule of estoppel by judgment applies as between the jurisdiction of the courts of the United States and the courts of the several states.

The Constitution of the United States, Section 1, Article IV, provides:

"Full faith and credit shall be given in each state to the public acts, judicial records and proceedings of every other state, and Congress may, by general law, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

Con. U. S., Art. IV, Sec. 1.

(g) The courts of the United States are bound to give the judgments of the state courts the same faith and credit that the courts of one state are bound to give to the judgments of the courts of her sister states.

Cooper v. Newell, 173 U. S. 567, 43 L. ed. 808;
Wisconsin v. Pelican Ins. Co., 127 U. S. 291, 32 L. ed. 239.

(h) "A judgment of a state court in a cause within its jurisdiction and against a defendant lawfully sum-

moned, or against lawfully attached property of the absent defendant, is entitled to as much force and effect against the person summoned or the property attached when the question is presented for decision in a court of another state, as it has in the state in which it was rendered."

This paragraph is quoted from notes to Section 1 of Article IV of the Constitution of the United States, and is supported by many authorities.

11 Fed. Stat. Ann. 194.

(i) In the case of Everett v. Everett, 215 U. S. 203, 54 L. ed. 158, it was held that a judgment of a probate court in Massachusetts in a proceeding for separate maintenance under a summary statute where the complainant alleged that she was the wife of the defendant and entitled to separate maintenance, while he denied that she was his wife and interposed several affirmative defenses; that a decision denying relief to her involved the issue as to whether the complainant was the wife of the defendant, and that the judgment would be given effect as an estoppel in a subsequent proceeding in the courts of New York brought to set aside a decree of annulment.

Everett v. Everett, 215 U. S. 203, 54 L. ed. 158.

K.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION REQUIRING APPELLANT TO CONNECT ITS TRACK WITH THE TRACK OF APPELLEE IS CONTRARY TO THE PUBLIC POLICY AS ESTABLISHED BY THE COURTS OF THE STATE OF ILLINOIS AND OF THE UNITED STATES, AND WHETHER APPELLEE'S TRACK BE A PUBLIC RAILWAY OR A SIDETRACK THE ORDER OF THE INTERSTATE COMMISSION COMPELLING APPELLANT TO CONNECT ITS RAILWAY WITH IT IS IN VIOLATION OF THE PENAL STATUTE.

(a) It is but a matter of inspection to ascertain that paragraph 9 of section 1 of the Interstate Commerce Act had not been changed or modified since its enactment many years ago. It has been carried in various revisions without modification. But, the enactment of the Transportation Act, by paragraphs 18 to 22, which now appear in section of the Interstate Commerce Act, the public policy of the Government in relation to the extension of railways and the construction of new railways is entirely changed. The original section must be read with the amendments of the Transportation Act and the intent of Congress derived therefrom. Congress had in mind and was endeavoring to correct the disastrous evils both to the railroads and to the public which for many years had attended the construction of lines of railroad, main and branch, in ruinous competition with each other and with resultant injury to the public, which was compelled to bear the inevitable consequences of such a situation.

Detroit & Mackinaw Ry. Co. v. Boyne City Ry. Co., 286 Fed. 540;

Railway Commission v. Southern Pacific Company, 264 U. S. 331, 68 L. ed. 713, 764;

Texas & Pacific v. Gulf, Colo. & S. F. R. Co., 270 U. S. 277, 70 L. ed. 583;

Western & Atlantic R. R. Co. v. Georgia Public Service Commission, 267 U. S. 493, 497, 69 L. ed. 757.

(b) The same policy has been established by the State of Illinois in relation to all public utilities.

Choate v. Commission, 309 Ill. 256.

To build a new facility of any kind without a certificate of public convenience and necessity is a violation of the Illinois law. Section 55 of the Public Utilities Act provides:

"No public utility shall *begin* the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility, or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction."

1925 Cahill's Ill. Revised Stat. 1902.

Section 76 of the Public Utilities Act provides:

"Any public utility or any corporation other than a public utility, which violates or fails to comply with any provisions of this act, or which fails to obey, ob-

serve or comply with any order, decision, rule, regulation * * * shall, upon conviction, be punished by a fine of not less than five hundred dollars."

Section 77 of the Public Utilities Act provides:

"Every person who, either individually or acting as an officer, agent or employe of a public utility or of a corporation other than a public utility, violates or fails to comply with any provisions of this act * * * is guilty of a misdemeanor * * *."

1925 Cahill's Ill. Stat., Chap. 111 (a), Secs. 76, 77, p. 1909.

(c) Paragraph 18, Section 1 of the Interstate Commerce Act provides:

"After ninety days after this paragraph takes effect no carrier by railroad subject to this act shall undertake the extension of any line of railroad or the construction of any new line of railroad, or shall acquire or operate any line of railroad or extension thereof, or shall engage in transportation under this act over and by means of such additional extended lines of railroad, unless and until there shall first be obtained from the Commission a certificate of present or future convenience and necessity," etc.

(d) Paragraph 20 of Section 1 of the Interstate Commerce Act provides:

"Any *construction*, operation or abandonment contrary to the provisions of this paragraph or of para-

graphs 18 or 19 of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest, and any carrier or any director, officer, receiver, operating trustee, lessee, agent or person acting for or employed by such carrier who knowingly authorizes, consents to or permits any violation of the provisions of this paragraph or of paragraph 18 of this section shall, upon conviction, be punished by a fine of not more than $5,000.00 or by imprisonment of not more than three years, or both."

3 Mason's U. S. Code Annt. 1926, Title 49, Sec. 1, Pars. 18 and 20, p. 3489.

It therefore appears that the order of the Commission is contrary to the policy established both by the State of Illinois and the United States, and whether this track be regarded as a sidetrack within the jurisdiction of the Illinois Commission, or an extension or new railway within the jurisdiction of the Interstate Commerce Commission, the order of the Commission required it to be connected and used in a violation of either the penal provisions of the Illinois statute or the penal provisions of the federal statute.

The assumption of the Interstate Commerce Commission that the mere connection of this track ordered by it could be within its power and jurisdiction, notwithstanding the track itself was unlawfully built and cannot be maintained, is in conflict with the fundamental maxims of the law. "*The principle gives character to the incident and not the incident to the principle.*"

ARGUMENT.

May It Please the Court:

We have endeavored to make a full statement of all the material facts relevant to the questions we are presenting by this appeal. In doing so we realize that we have necessarily stated many facts not of controlling importance, but, nevertheless, thought to be pertinent to a correct understanding of the case as a whole, or of some fact deemed relevant.

Classes of Evidence Omitted.——Two classes of evidence we have but alluded to and made no effort to fully state: (1) that relating to practicability, safety and cost of constructing and connecting the switch between appellant's railway and the new track constructed by appellee, and that concerning whether sufficient revenue would come to the appellant from the connection to justify the expense of constructing and maintaining it. These were contested questions before the Commission, and a review of the evidence, we think, would show that they were decided contrary to the manifest weight of the evidence. Nevertheless, as there was some evidence tending to support the contentions of appellee upon those issues, we understand that this Court would hold those questions finally settled in favor of appellee by the finding of the Commission; (2) all evidence as to good and bad faith on the part of either the appellant or appellee in

negotiations concerning a reciprocal switching arrangement, or a switch connection with a proposed spur track, and all that which relates to the need of appellee for more efficient service from the Illinois Central Railroad Company, and the effect a new connection with appellant's railway might have on the development of its mine or the enlargement and extension of its business, we have treated as immaterial and merely alluded to the same as a part of the case heard by the Commission. We have only stated this evidence sufficiently to show that it was made a dominant issue which we then and now contend was wholly immaterial to the issues made upon appellee's complaint or petition.

Misconception of the Issues by the Commission.——When the complaint was filed before the answer was due under the rules of the Commission the case was referred to the "Service Division," which is No. 5, of the Commission. When Director Bartel of that division, sitting as Examiner in this case, attempted to state the issues before him, although the answer had then been on file several days, he totally disregarded the affirmative defenses set up in the answer, as shown in our statement, and said in substance that the questions were whether the sidetrack had been built, whether a demand had been made for a switch connection therewith and whether it would be practicable, reasonably safe and the revenue to be derived to the appellant by the connection would justify the expense.

Counsel for appellant then made an effort to draw his attention to the defenses stated by the answer and suggested that the questions to be tried were not "questions of service," but of power and authority under the admitted facts to build and maintain such a track, and whether the Commission had power to require appellant to make a connection with a track which had been built without authority and is an unlawful structure (R. 180). Neither the answer, the evidence relied upon to sustain the affirmative averments thereof, the citation of authority, nor the persistent efforts of counsel for appellant were sufficient to secure the attention of the Examiner or the members of the Interstate Commerce Commission to the affirmative defenses relied upon by appellant. This is shown by a statement contained in the Commission's report, entirely too narrow to cover all of the affirmative defenses presented, but sufficient to disclose that the Commission never varied from its original conception that this is only a case of willful refusal to render service that the appellee was clearly entitled to have. The statement of issues made by Director Bartel and adhered to by the Commission throughout its consideration of the case is as follows:

> "Specifically the defendant opposes the installation of a switch connection, or an order from the Commission requiring same on the following grounds: (1) That the building and maintenance of such a track is beyond the scope and power granted the complainant by the Illinois charter; (2) that such a track by rea-

son of the contracts between the complainant and the Illinois Central and between the complainant and the Power Company will, under the law of Illinois, become a public track and be a part of the public highway of the railways with which it shall be connected, and that an order requiring the connection sought would be in legal effect an extension of defendant's line to a point not consented to and would in effect be a taking of property without due process of law and a denial to it of the equal protection of the law; (3) that the making of the proposed connection would complete a new connecting railway between the Central and defendant without a Certificate of Public Convenience and Necessity having first been obtained as required by the Illinois Commission's law and the Interstate Commerce Act; (4) that the connection would not be reasonably practicable, nor could it be put in with safety, nor would it furnish sufficient business to justify its construction and maintenance.

"The first two contentions are primarily matters for judicial interpretation and they will not be further considered here.

"Under the third contention the defendant argues that the construction of this mine track comes within the provisions of Paragraphs 18 to 21 of Section 1 of the Interstate Commerce Act. In other words, that it is an extension of the railway of the Central, and, therefore, a Certificate of Public Convenience and Necessity should first have been obtained. To this we do not agree. We are not here called upon to determine what effect the contracts heretofore referred to may have in the event that operation of the mine track by the Central or the Power Company is undertaken" (R 446)

It is evident from this statement that the only question which the Commission deemed relevant was whether this track may *hereafter* be operated in interstate commerce in pursuance of the terms of the contracts between appellant and the Illinois Central and the Power Company, respectively; totally disregarding and refusing to consider that by its very statement the implication is carried that the Commission was convinced that this track was constructed as an interstate railway to be operated both as a connecting line and as an extension in direct violation of the words of Paragraph 18, Section 1 of the Interstate Commerce Act, "No carrier by railroad subject to this act shall *undertake* the extension of any line of railroad or *the construction* of any new line of railroad," without first obtaining a Certificate of Convenience and Necessity from the Interstate Commerce Commission, and section 20, which provides that *any* construction by *any person*, or *corporation*, in violation of the provisions of paragraph 18, shall subject the *person*, or *corporation*, to a fine of not more than five thousand dollars or imprisonment for not more than three months, or both. The Commission treated the word "undertake" in paragraph 18 as though it read, "shall hereafter operate." Other phrases in the section cover the matter which the Commission must have had in mind when it said, "We are not here called upon to determine what effect the contracts heretofore referred to may have in the event that opera-

tion of the mine track by the Central or the Power Company is undertaken." Another clause covers that situation, not here pertinent. It thus appears that, aside from the issues formed by a denial of the material and jurisdictional allegations of the complaint, all other issues were by the Commission neatly set aside to be decided by some other tribunal, or by the Commission upon a future complaint. This was a clear misconception of its duty, for the question whether appellee had undertaken the extension of a railway or the construction and connection of this track to serve as an interstate railway was directly involved in the issues, and in entering the order for the connection, thereby completing the unlawful construction, the Commission compelled appellant to violate paragraph 20, and literally incur the penalty imposed by that paragraph. Not only on this issue, but on every other involving the lawfulness or unlawfulness of the structure, the Commission assumed that if there was literal authority in paragraph 9 of section 1, authorizing the Commission to order the construction of a switch connection, all other provisions, both of the same section and of the Constitution and laws of Illinois from which alone authority could be derived to construct such a track, might be disregarded, and that the mere incident of a switch connection would give color and character to the entire track so far as the Commission is concerned, thus overlooking the elementary maxim of logic and law that the principal controls and gives color to the incident and not the incident to the

principal. The less is contained in the greater. The track includes the connection, the connection does not include the track. Within the meaning of this statute a structure is *not* a track unless it may be lawfully constructed and maintained.

Failure of Appellant to Secure the Attention of the District Court to the Real Issues.——The District Court likewise excluded from its consideration all of the affirmative contentions shown by the record to have been made by appellant before the Commission. It confined its consideration to the issues formed upon the complaint as embracing the entire merit of the case and manifested an antipathy to the position taken by counsel for appellant that this track was unlawfully built and is shown by the evidence to have been constructed for the purpose of invading the transportation territory of appellant.

These facts, though urged with sincerity, apparently made no impression whatever upon the District Court: (a) That appellee's mine is located on the railway of the Illinois Central 2.5 miles from the rails of appellant; (b) appellee had never been a shipper from this mine in interstate commerce on the railway of appellant, except as a connecting railway with the Illinois Central and intermediate carriers; (c) that appellant is located on a line of one of the largest coal-carrying railways in the southern coal district of Illinois and has potentially, at least, the greatest facilities for transportation that can be afforded by any railway company in the Mississippi Valley,

both for expedition and breadth of market range; (d) that the charter of appellee does not authorize and the Constitution and laws of Illinois forbid appellee to build, maintain, lease or operate a railroad track across public highways, or connect, or to be connected with common-carrier railways; (e) that this track in physical construction, location and appearance, the uses for which intended and the relation it would sustain to the railway of appellant and of the Illinois Central is not and cannot become a *sidetrack;* (f) that it was built under contracts which fix its character for use by three railway companies as an interstate and intrastate railroad; (g) that assuming contrary to the fact that this is a *private sidetrack*, it cannot under the laws of Illinois be maintained in existence or lawfully used in intrastate commerce unless the superior sovereign, the United States, shall override the Constitution and laws of Illinois and the decisions of its Supreme Court that it is an unlawful structure built by a corporation having under its charter no power to build it, and that aside from that question its construction and maintenance is by Paragraph 22 of Section 1 of the Interstate Commerce Act committed exclusively to the jurisdiction and power of the State of Illinois (United States Revised Code, Title 49, Sec. 1, Par. 22; Western & Atlantic R. Co. v. Georgia Public Service Commission, 267 U. S. 493, 497); (h) that the evidence undisputed shows that this track was built as and for a connecting railway and an extension of railways without a Certificate of Public Con-

venience and Necessity from the Interstate Commerce Commission; (i) that if a sidetrack, its construction cannot lawfully be commenced without a Certificate of Public Convenience and Necessity from the Illinois Commission. If a railway, or an extension, it could not be commenced without a Certificate of Convenience and Necessity from the Interstate Commerce Commission. If commenced as a sidetrack without such certificate the penalties of Sections 76 and 77 of the Illinois Commerce Act render the commencement a violation of a penal statute. If commenced as a new railway, or an extension of railways to be engaged, or engaged, in interstate commerce would violate the penal provisions of the Interstate Commerce Act.

All this we urged upon the attention both of the Commission and the Court, and though we may be obtuse, we do not understand why these questions were not regarded as of sufficient importance to challenge the attention, first, of the Commission and, later, of the Court.

District Court in Conflict With Policy Established by the Transportation Act.——Undoubtedly the Court did not appreciate the policy established by the Transportation Act, and, as this Court has said, that policy is the key to the interpretation of the provisions of paragraphs 18 to 22. In a similar case in which counsel assumed a similar attitude in construing these paragraphs, after enumerating

the various similar contentions made by them, this Court said:

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern, that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss" (Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U. S. 277, 70 L. ed. 583).

Speaking of the power of Congress over intrastate operations to promote the object to develop an adequate system of interstate railway transportation, this Court said: "The affirmative power of Congress in developing interstate commerce agencies is clear. In such development it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desir-

able. This is because of the supremacy of the national power in this field" (R. R. Com. v. C. B. & Q. R. Co., 257 U. S. 563-590, 66 L. ed. 371, 382, 384).

Emphasizing the scope of the Transportation Act intended by the general policy of the act, as clearly expressed by its general terms, you said: "While none of the amendments in specific terms confer upon the Commission exclusive power over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers extend to junctions between main lines like those here in question" (Ala. & V. Ry. Co. v. Jackson & E. Ry. Co., 271 U. S. 244, 248, 70 L. ed. 928, 930.

The necessity of sufficient limitation of the power of the several states over construction and operation to prevent evasion of the requirements of the Transportation Act and prevent interstate carriers from defeating the manifest objects of that act, under the pretense that the questioned construction or act is, in its nature, intrastate and for intrastate use and not within the provisions of the act of Congress. This sort of evasion, we assert, was attempted in the effort to get state authority to construct this track in a direct grant to the Illinois Central, and afterwards obtaining the grant to appellee, an Illinois corporation, without charter power to exercise it, thus, in substance, giving the granted power to the Illinois Central to be exercised in the name of appellant.

The views expressed by Circuit Judge Evans, presiding on the three-judge court, is in apparent conflict with the views thus expressed by this Court. Considering whether the Court would allow appellant the usual stay or injunction order pending an appeal from its order dismissing the bill for want of equity, a motion for which was by the way denied, on the subject of the irreparable injury that would result by requiring the connection, counsel for appellant mentioned the invasion of its coal field by other carriers and the interference with its ordinary operations on tracks congested with the traffic of industries located on its own railway as elements of damage. To this Judge Evans replied:

> "Your latter statement only goes to show the absolute necessity of government regulation. That is exactly what public utilities ought to do, they ought to care for *anybody anywhere under all circumstances.* • • • *I cannot understand it.* What you get one place you lose in another, but you are the carrier of commerce, that's your only duty."

This statement is the more surprising coming from the presiding Judge of the Court to whom a brief had been submitted quoting the language of this Court, both in **Texas & Pacific R. Co. v. Gulf, Colo. & S. F. R. Co.**, supra, and the language of Chief Justice Taft in **Railroad Commission v. Southern Pacific Company**, 264 U. S. 343, 345 (R. 170).

There was no question of discrimination in the issues. What was said by the learned Judge, therefore, must have had reference to our contention that appellee should not be permitted to engross overtaxed facilities from shippers on our railway, nor the Central and the Power Company be permitted to invade our coal territory and take from our railway a coal business that we have built up within the last twenty years by a capital investment of approximately twenty millions of dollars to enable the appellant to furnish shipping facilities to the coal producers who have located their mines on our railway in anticipation of the facilities we had provided for their use. The implication is clear from what was said by the presiding Judge that for us to endeavor to preserve the facilities upon faith of which they have located their industries on our line against such an invasion of the rights of our patrons so located and the revenues upon the faith of which appellant made this enormous investment is a violation of appellant's duty as a common carrier. If we understand the interpretation made of the Transportation Act by this Court, we were not only within our rights in taking that position, but it was our duty to do so.

Interstate Commission Bound by Statutes and Decisions of Illinois Establishing That the Track of Appellee Is An Unlawful Structure (II A. Brief, p. 63).——The Commission rightly held by implication that it had no control over the construction or abandonment of a private side track located wholly within a state, but wrongfully as

sumed that it was not bound by the decisions of the Supreme Court construing the Constitution, statutes and contracts under which the track was constructed to determine whether it is a public or a private track, or whether it is an unlawful structure which when completed would violate penal statutes. This would seem to be an elementary principle not necessary to argue to this Court, but it is very apparent from a reading of the Commission's report that it took the view that the character of the track was not involved in the issues. In that false premise we insist its erroneous conclusions have their origin. We have collated a number of authorities under the corresponding division of the preceding brief of the argument to which we shall refer in the subtitles of this division of the argument, which seem to establish beyond controversy that on this very question of separation of jurisdiction between side, spur and industrial tracks and new railways and extensions of railways this Court has settled that the law of Illinois is applicable and shall control the construction and maintenance of this track if it is the character of track, namely, a sidetrack, as held by the Interstate Commission. It is inconceivable that this Court would hold that although this track is an unlawful structure which cannot be maintained that it was yet within the legal power of the Interstate Commerce Commission to order a switch connection with it and thus complete it as a track. If all of that part of the track between appellee's mine and the switch connection was unlawfully con-

structed and cannot be maintained, it would seem futile for the Interstate Commission to order it connected, but it has done so on that theory. If, as this Court has repeatedly held, its construction and abandonment is within the jurisdiction of Illinois and it has been condemned as an unlawful structure by the highest court of the state, then it would be an encroachment upon the jurisdiction of Illinois ceded by paragraph 22, as construed by the federal courts, to compel the connection, but that appears to be exactly what has been done in derrogation of Illinois jurisdiction, for the present conceding the track is a private sidetrack. We cannot believe this Court will give its approval to such a theory or such procedure.

What statutes and court decisions apply in the case just stated? We insist those of Illinois. It would result in confusing absurdity to hold that Illinois has exclusive right to decide and at the same time to assert that its conclusion is not binding, but that the Commission's report is in effect just that and nothing else.

In the case of Smith v. Mernochen, 7 How. 217, supra, this Court said:

> "The highest court of the State of Alabama has given a construction to the act of the Legislature chartering this company, which we have seen is fatal to a recovery. It belongs to the state courts to expound their own statutes; and when thus expounded the decision is the rule of this Court in all cases depending upon the local laws of the state" (II-A-[e], Brief, p. 64).

It is also clear that this Court has not construed paragraph 9 of section 1 as the Commission construed it. The words "shipper," "lateral branch line" and "private sidetrack," in paragraph 9, do not relate to what the structure may become, but to what it must be at the time the complaint was filed. On that subject this Court said:

> "The words 'lateral branch line' do not refer to what the applicant may become or be by the order of the Commission, but to what it already is when it applies" (United States v. B. & O. S. W., 236 U. S. 18, supra) (II A [f], Brief, p. 65).

This establishes that it was for the Commission to determine the status of the track with which the connection was proposed and that it erred in holding that any track built by anyone without regard to the lawfulness or unlawfulness of the structure, or the purposes to which it is to be devoted, may be lawfully ordered connected and that these things and the uses which would be made of it in intrastate commerce, are questions not within the issue in a proceeding of this sort.

A Track Built From One Railway to An Industry Located on Another Is Within the Prohibition of Paragraphs 18 to 22 of Section 1 of the Interstate Commerce Act (II-B, Brief, p. 66).——The purpose of enacting paragraphs 18 to 22 was to prevent wasteful construction and extension of railways into new territory when not needed to give service to the public, and wasteful competition.

Although a particular track may have many of the indicia of a private side or spur track, if it is built into new territory already served by another carrier as a means of competition, it is within the prohibition of these paragraphs. There was a disposition on the part of the Commission to treat this track as though it were the private property of the appellee and to totally disregard any public character that may attach to it in consequence of its location and intended uses. Would that make any legal difference? We answer no. The character of the track, as we have indicated, must be determined by the facts of the particular case, and the law of the State of Illinois authorizing or prohibiting its construction. The significance of the location of the legal title to it is equally a question of Illinois law. It is, therefore, important before discussing the main questions to determine whether the fact of legal title is controlling, or whether it is immaterial to the consideration of the character of the track as public or private, and whether a sidetrack as related to railroads and railroad uses. Long before any Public Utilities Act became a law of Illinois the legal character of a track constructed as this is upon or across highways was determined by the Supreme Court of Illinois in a long line of decisions. Primarily, an individual has no right to build any structure in a public street or upon public grounds. Early in the history of the state ordinances were enacted by city councils giving the right to the owners of industries to locate industry tracks in public streets and connect

them with railways for the purpose of affording railway transportation to and from their industries, on the main lines of railways or to reach the same. The question, therefore, early arose whether such ordinances were valid. Suits were brought to compel the removal of such tracks from public streets. The Supreme Court of Illinois held that the location of a track upon or across a street unconnected with a railroad would be a purpresture upon the street. Such unconnected track would be useless to anyone. The intent of such an ordinance must be that the track should be connected with the main track of a railway, and as such a grant to an individual is in substance to the railway corporation with whose railway it has been or is to be connected, it was held that when connected, regardless of the title to the track, it becomes a public railway and a part of the railway system with which it is connected, regardless of title or ownership when considered in its relation to the railway and to the public. This question was fully considered and the cases cited in the case of St. Louis, Springfield & Peoria Railroad v. Commerce Commission, 309 Ill. 621, at 625 (II-B-[a], Brief, p. 66).

In considering this track, therefore, in its relation to the railways of the Illinois Central, the Power Company and appellant, it must be considered as a part of the railways with which it connects, and its public character is conclusively settled by the decisions of the Supreme Court of Illinois holding that it is a public track and a part of

such railways, and that the fact of the legal title to the track and the land upon which it is located is a matter of no importance.

We have mentioned the principle and cited the decisions of this Court which establish the public policy intended by the enactment of the Transportation Act. That policy has been recognized by the Courts of Illinois and one of such cases came before this Court for consideration. The Illinois interpretation and construction of Paragraphs 18 to 22 of Section 402 of the Transportation Act, now Section 1 of the Interstate Commerce Act, in that case had the approval of this Court.

In the case of Marion & Eastern Railroad Company v. Missouri Pacific Railroad Company, 318 Ill. 436 (II-B-[c], Brief, p. 68), the Virginia Coal Company located a mine on the railway of the Marion & Eastern. A track was extended by the Marion & Eastern to the property line. The sinking of the mine was abandoned for a period of time. At the time that work was about to be resumed the Missouri Pacific prepared to extend a track a distance of about one mile from one of its industry tracks to the mine for the purpose of competing with the Marion & Eastern for the transportation of coal from the new mine. The Marion & Eastern brought an injunction suit in the Circuit Court of Williamson County to restrain the construction of the track and a temporary injunction was granted. On motion to dissolve and upon a hearing which presented the facts and contentions of the respective parties, the

Circuit Court of Williamson County dissolved the injunction and dismissed the bill for want of equity. Upon appeal to the Supreme Court of Illinois it was held that ordinarily spur or industrial tracks are those which are used for the loading, reloading, storage and switching of cars and other services merely incidental to the regular train haul. The issues showed that this track was not to be used for such purposes, but that coal would be taken from the mine as a part of the transportation haul at the same rate as all coal would be hauled by the Missouri Pacific from other mines located upon its rails. It also appeared that this mine, as located upon the Marion & Eastern, would have direct connection with the railway systems of the state and enjoy transportation facilities of those railways, a part of the haul, of course, being over the line of the Marion & Eastern. It was, however, considered by the Supreme Court of Illinois that the determining factor which established the character of this track was that it entered territory already served by the Marion & Eastern, and that the facts that on this track there would have no line-haul rates, no continuous train movements on it, no stations erected, no billing of freight required, except through existing facilities, did not make it a sidetrack or industry track; that the effect of its construction would be to afford railroad service in direct competition with the railway of the Marion & Eastern already in the field, and for that reason the track was a duplication of lines of railway not shown to be necessary for the present or future

public convenience and necessity, but to add to the burden of maintenance which the public would be required to pay; and, therefore, the construction of the track by the Missouri Pacific was an extension of its railway in violation of Paragraph 18 of Section 1 of the Interstate Commerce Act, because attempted without a Certificate of Public Convenience and Necessity. A petition for a writ of certiorari was presented to this Court to review these conclusions of the Supreme Court of Illinois in case No. 1009, Petition for Writ of Certiorari, 271 U. S. 661, 70 L. ed. 1137, and denied, the effect of such denial being the approval of the conclusions of the Supreme Court of Illinois upon the facts of that case (II-B-[e], Brief, p. 70).

On March 1, 1926, this Court, in the case of Texas & Pacific R. Co. v. Gulf, Colo. & S. F. R. Co., supra (II-B [d], Brief, p. 69), held that the fact that a railroad company is building a line for the purpose of enabling it to compete with another railway company in transportation from an industry on the line of the latter, makes it an extension of the railway from which the new track is extended. This Court in that case found the same test as controlling as that applied in the case of Marion & Eastern v. Missouri Pacific, supra, and, among other things, said:

> "When a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."

In denying the petition for a writ of certiorari in the case of Missouri Pacific v. Marion & Eastern, No. 1009,

your Honors undoubtedly had in mind your conclusions in the case of Texas & Pacific v. Gulf, Colo. & S. F. R. Co., and applied them to the Marion & Eastern case. The remedy of the public for failure of a common carrier or public utility to discharge its duty of adequate service is not new construction and competition. The Supreme Court of Illinois, considering a statute somewhat similar to Paragraphs 18 to 22 of Section 402 of the Transportation Act, pointed out the remedy of the public in harmony with the views expressed by this Court in the cases cited in these words:

> "The statute (the Public Utilities Act) provides the means of compelling the existing transportation system to provide adequate service for the public. If the people living in the territory through which the Aurora, Elgin and Chicago Railroad operates are not being properly served they can file a complaint with the Commerce Commission, which has the power to order whatever change or increase in service the evidence warrants. If the existing transportation company does not comply with the Commission's order, then a situation *may* arise where the public convenience and necessity will require the establishment of another system. The theory of the Public Utilities Act is to provide the public with efficient service at a reasonable rate by compelling an established carrier occupying a given field to provide adequate service and at the same time to protect the existing utility from ruinous competition (West Suburban Transportation Co. v. Chicago and West Towns Railway Co.,

ante, p. 87, 309 Ill.). By this method the public is protected from paying the cost of the operation of competing systems and a return upon double the investment of capital" (Choate v. Commission, 309 Ill. 256) (II-B-[e], Brief, p. 70).

The record shows and upon a precisely similar record the Supreme Court of Illinois held that the appellee had made no complaint, either to the Illinois Central or to the Illinois Commerce Commission, of the failure of the Illinois Central, or its inability to perform adequate service at reasonable rates for the transportation of the product of appellee's mine, nor is there any contention that a joint route or through rate was ever requested from its mine to any point within the State of Illinois that was denied. The uncontroverted evidence did show, however, that one such application over the railway of the Illinois Central and appellant through the Eldorado connection was granted and that the appellee was more than satisfied with the rate fixed by the Illinois Commission and consented to its modification upward (R. 217).

Appellee Had No Charter Power to Construct the Track and Is Expressly Prohibited From So Doing By Illinois Statutes (II-C, Brief, p. 71).———Appellee is a private corporation of Illinois only authorized by its charter to mine and sell coal and without charter power to build, own, lease, maintain or operate a railroad and is prohibited by Sections 55 and 58 of the Illinois Public Utilities Law

from laying a private railroad track across a public highway or a public railway. In the case of The C. C. C. & St. L. Ry. Co. v. Commerce Commission, 315 Ill. 477, the Illinois Supreme Court, dealing with this case as presented to the Illinois Commerce Commission upon the same facts in relation to charter powers of appellee, said:

> "A coal corporation is not a public utility" (Public Utilities Act, Sec. 10), "but is a private enterprise. It possesses no charter powers to build a railroad" (II-C-[a], Brief, p. 71).

Section 10 of the Public Utilities Act, defining what a public utility is, excludes all private corporations transacting merely an ordinary commercial business (II-C [b], Brief, p. 71).

Section 55 of the Public Utilities Act, conferring authority upon railroads to construct a new track across a public highway, prohibits its doing so without a Certificate of Public Convenience and Necessity. Such a track would be a new facility and under the provisions of this section no public utility can construct a new facility, plant or equipment not in substitution of an existing plant, equipment or facility, nor an extension of any plant, equipment, property or facility without a certificate of public convenience and necessity (II-C-[c], Brief, p. 73).

It is settled by the decisions of the Supreme Court of Illinois that a private corporation cannot build such a track exclusively for its own use (II-C-[d], Brief, p. 74).

The Public Utilities Act also expressly prohibits the laying of any railroad track across a public highway without the consent of the Public Utilities Commission and confers no power upon a private business corporation to lay a track across a public highway or a public railway (II-C-[e], Brief, p. 74).

So strictly do the courts of Illinois apply the principle that a private track cannot be laid across a railroad or a public highway that it denied the right of eminent domain to a railroad company that attempted to lay a track across another railway to reach an industry upon the ground that such track when laid would be but a private track not needed as a railway facility (Litchfield & Madison v. Alton & Southern R. Co., 305 Ill. 388, 395) (II-C-[f], Brief, p. 75).

A large number of cases establish conclusively the principle for which we here contend (II-C-[g], Brief, p. 76). Discussing this question in one of the later cases, cited supra, the Supreme Court of Illinois said:

> "It has been frequently held by this Court that a railroad track, though used in connection with an industry on the line of the railway, is, as between the public and the railway company, a part of the railway, whether constructed by the railway company or the owner of the industry."

And, in that case it was said that it is only upon that theory that a track may be laid across a public highway

to connect with an industry, and if the railway company is not to use the track then a private individual or corporation can neither construct, maintain nor operate it (St. Louis, Springfield & Peoria R. R. v. Commerce Commission, 309 Ill. 621, at 625) (II-C-[g], Brief, p. 76).

If Interstate Commission Has No Jurisdiction of the Track As Assumed in Its Order the Illinois Law Controls Its Character (II-D, Brief, p. 77).———In analyzing the Commission's order we pointed to the fact that it assumed that the Commission had no jurisdiction of the construction, maintenance or character of appellee's track. If that is a correct assumption, which we deny, the track having been constructed under the laws of Illinois by an Illinois corporation with limited charter powers, is a public or private track as determined by the laws of Illinois, and we have shown that the courts of Illinois have settled definitely that such a track is in its nature public, whether a new railway, an extension of railways or a sidetrack (II-D-[a], Brief, p. 77). This is a proposition definitely settled by the highest courts in Illinois upon a matter assumed by the Commission to be within the jurisdiction of the Illinois Commission and Illinois courts, and such jurisdiction is ceded to Illinois by Paragraph 22 of Section 1 of the Interstate Commerce Act. Not only is that true, but this Court has so construed and so applied that paragraph, as we have already shown.

Appellee Not a Shipper on the Railway of Appellant (II-E, Brief, p. 77).———We now come to a discussion of the specific language of Paragraph 9 of Section 1 of the Interstate Commerce Act upon which appellant's complaint is predicated (II-E-[a], Brief, p. 77):

> "Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper."

The complaint charges that the track in question is a "private sidetrack" and was applied for by a shipper tendering interstate traffic for transportation. The Commission throughout the proceeding before it and at its various stages of progress, from Examiner to division and from division to entire Commission, treated these provisions as having application regardless of whether the proposed track is public or private. It also assumed that the words "shipper in interstate commerce" contained in

this paragraph would apply to any shipper without regard to his location or the railway upon which he is a shipper, or whether he is at present a shipper or a contemplated shipper. We then insisted and now insist that this application of these words is broader than the intent of Congress and justified by no reasonable rules of construction (II-E, Brief, p. 77).

We have just shown that whether the track is in fact a public or a private track so far as the Interstate Commerce Commission is concerned is definitely settled by the decisions of the Supreme Court of Illinois holding that such a track is a public track (II-D, Brief, p. 77). If the contention of counsel for appellee and the apparent conclusions of the Commission be correct, that it is no concern of the Commission as to what the intended use of this track may be, although that is a question which may arise in the future, still it cannot be disputed that whether it is a public or a private track was an instant question to enable the Commission to determine whether it was a track within the terms of paragraph 9. If determined that it was a public track, then appellee did not have such a track as paragraph 9 required when it made its application for the connection. Moreover, the Commission held in accordance with the decisions of this Court that it must have had presently such a track as paragraph 9 requires when it made its application for the connection (United States v. B. & O. S. W., 236 U. S. 18) (II-A-[f], Brief, p. 65). This paragraph was originally enacted to give a

shipper who needs it an outlet and not a roving commission to descend upon a railway at pleasure. Therefore, it cannot be construed to apply in favor of any shipper who has an outlet and may determine for ulterior reasons to make such descent (Interstate Commerce Commission v. Delaware, L. & W., 216 U. S. 537, 54 L. ed. 605) (II-G-[e], Brief, p. 84).

The object Congress intended to effect is, of course, a key to the interpretation of the language of this paragraph. If the language is harmonious with the object sought to be attained, it must be literally applied. This section makes provision both for the owners of lateral branch lines and for the owners of private sidetracks. It would require a broad stretch of imagination to conceive that Congress had in mind a shipper in interstate commerce on some other line of railroad than the one with which the connection is sought. If so, it must have meant any shipper on any other line of railroad than the one with which the connection is sought without reference to distance and intervening obstacles. The only questions for the Commission under such a construction would be whether the applicant is an intended shipper in interstate commerce located at any place, as was said by Judge Evans considering this very situation, located "anywhere and under all circumstances" (R. 170). Let us see what such a construction would lead to, and for an illustration let us take the situation in the coal field of Southern Illinois, as shown by the evidence and the exhibits of maps

to which attention has been called in the statement: This field is interlaced with the railways of the Illinois Central, the Burlington, the Big Four, the Chicago & Eastern Illinois, the Missouri Pacific, the Louisville & Nashville, the Southern, the Wabash, Chester & Western, and the Illinois & Missouri, each within distance to make this sort of descent upon the coal mines located upon the railways of all others. Judge Evans' construction of this statute would give each of these nine railroads the right to build a spur or connecting track and compete with all of the others at every mine in this territory where it is physically possible to build the tracks, and each of these railroads would be required to give connections to all of the others on its line to facilitate such competition, the theory being that if the track is constructed, no matter whether lawful or unlawful, and whether located upon highways and across other railways, if the track is in fact constructed the right to the connection under paragraph 9 of section 1 applies, and under it the connection may be secured. Separately considered, there can be no doubt that each connection would give to the railroad with which connected a sufficient revenue to justify the connection, but upon the whole many of the companies would lose heavily and in the end the public would suffer the losses incident to eight times more construction than is necessary to attain the object of reasonable rates and routes over this field to the principal markets reached by this group of railroads, and the weaker railroads would most likely be driven out of

business because the principal income of a number of them is derived from coal haulage. This situation may be further illustrated by the policy adopted by the Missouri Pacific in the case of the Virginia Coal Company. The Missouri Pacific came into this field many years after it had been occupied by the C. & E. I., the Illinois Central and the Burlington and found self interest made competition for business expedient. The incident of the attempt to connect with the mine of the Virginia Coal Company on the rails of the Marion & Eastern, to which we have alluded, is, however, but one of a number of such efforts made to build a competing extension and connect it with a coal mine on another railroad, and it is common knowledge in that territory that certain aggressive railway corporations determined upon a policy of connecting their rails with every existing mine in the territory located upon other railways they could reach. The decision of the Supreme Court of Illinois, approved by this Court in the case of Marion & Eastern v. Missouri Pacific, cut short that program and doubtless prevented a competitive warfare in that field among competing railroads, the losses of which would have fallen ultimately and heavily upon the general public. The language of the statute is: "Any shipper tendering interstate traffic for transportation." To whom must the traffic be tendered? Must it not be tendered to the company with whose railroad the connection is sought? Is the existence of a mine on the Illinois Central two and one-half miles from

the rails of appellant a tender of interstate commerce for the transportation of the railway of appellant? Does the unlawful construction of a track from that mine to the right of way of appellant constitute a "tendering" of interstate traffic to appellant? What do the words "any shipper" mean? Can they mean any person intending to become a shipper, or must he in fact be a shipper upon the railroad with which the connection is sought? The tender must also be made on a private side-track "which may be constructed." Should the Commission have held that a track unlawfully constructed is a track "which may be constructed"? Is it not apparent that this language will not apply to a shipper upon another railroad who seeks a connection from his plant to a railroad upon which its plant is not located? In legal contemplation is a track which can only be constructed in violation of law and cannot be maintained without a violation of the law a track which "may be constructed"? The Supreme Court of Illinois regarded the location of this track as forbidding its demand upon appellant for service. That Court said:

> "An examination of the plat discloses that the coal company's mine is not on the Big Four and cannot be considered an industry on that road."

Further reasoning on the subject this fact was held to forbid the conclusion that appellant as a common carrier owes to appellee a duty to transport coal from its mine

located on the Illinois Central (The C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 469) (II-E [b], Brief, p. 78).

It may seem strange to this Court in view of what has been said, but the principle applied by the Supreme Court of Illinois is found in two very well considered opinions of the Interstate Commerce Commission. One of them happens to involve the precise situation we have here. In the case of Dering Mines Company v. Director General, 62 I. C. C. 265, it was said:

> "The complainants ask that the Illinois Central shall serve the mine on the Big Four, and that the Big Four shall serve the mine on the Illinois Central, under trackage agreements or switching absorption arrangements, and thereby make their mines joint mines."

Following a former case (Ridge Coal Company v. C. B. & Q.), it was said:

> "We there found, in substance, that the service of a mine by a carrier under a trackage agreement is, in practical and legal effect, the substantial equivalent of an extension of its rails to the mine" (II-E [c] [d], Brief, p. 78).

It was held that the Commission had no power to order such extension. Turning to the case of Ridge Coal Min-

ing Company v. Missouri Pacific R. Co., 62 I. C. C. 259, at 260, it was said:

> "It appears that substantially all the existing trackage agreements of the Burlington were entered into at a time when the carriers *were actively competing for additional business*. The Burlington objects to further extensions of its service to mines not on its rails on the ground that, during periods of car shortage, it is unable to provide an adequate supply of equipment for shippers to whom it already owes an obligation to furnish transportation."

Here the Burlington took the precise position that was so severely criticised in appellant by Presiding Judge Evans. The Burlington contended that it owed a car supply first to mines upon its own railroad. Appellant contended before the three-judge court that it first owed its trackage facilities, the use of which had reached maximum capacity, to industries upon its own railroad. It will appear that the Commission sympathized with the Burlington, but did not consider the plea of appellant, and appellant met the severe criticism of the Presiding Judge of the three-judge court. Continuing the Commission said:

> "It is our view that the service of such mines by the Burlington under trackage agreements is, in practical and legal effect, the substantial equivalent of the extension of its rails to them" (citing a number of cases).

"The equality in treatment among shippers which the law requires of a carrier extends only to shippers whom it is under a duty to serve, and the Burlington owes no such duty to the complainant."

Why did the Burlington owe no such duty to the complainant? The Supreme Court of Illinois found that such duty was not owing by the Burlington, nor by the appellant, because the complaining industry was not on the railway of the Burlington and appellee is not on the railway of appellant. We submit that this was sound logic and its own views should have been followed by the Interstate Commerce Commission. It was further found by the Supreme Court of Illinois that what the appellee asks for in this proceeding is the substantial equivalent of a reciprocal switching arrangement or a trackage agreement. On that subject it was said:

"It would seem clear under these holdings that whether such connection is a joint mine status by trackage agreement or by order of the Interstate Commerce Commission, or is an actual physical connection by bringing a track to the right of way of the road sought to be connected, the result is the same. Both constitute an extension of the latter road to an industry not on its line" (C. C. C. & St. L. Ry. Co. v. Commerce Commission, 315 Ill. 472) (II-E [b], Brief, p. 78).

On this subject the vice-president of appellee, when the question was squarely put to him, said:

> "It is true that if we had a reciprocal switching arrangement with the Big Four between the Big Four and the Illinois Central from the connection at Eldorado, to our mine, we would have all that we are contending for in the construction of this track" (R. 219).

It thus appears that the appellee has obtained through the Interstate Commerce Commission the very thing which the Commission held it was not entitled to have, because to grant it would be the equivalent of requiring appellant to extend its rails to appellee's mine, and appellant as appellee is situated owes it no duty as a common carrier.

Appellant's Track Is Not a Sidetrack as Alleged by the Complaint (II F, Brief, p. 81)——The evidence does not bring this track within the description of the word "sidetrack" as that term is understood in common usage. What is a sidetrack? Is a lateral branch line a sidetrack? Is a spur extending from an industry on one railroad to another a sidetrack? Is a track constructed with 85-pound rail, creosoted ties and rock and cinder ballast, first-class bridges and in every way the equivalent of the main track of the Illinois Central and appellant what is meant by the word "sidetrack"? Is a track built for the transportation of freight and passengers, the extension of spurs into new territory, the use by the public on either side of it for the location of industries and to be used

for the traffic of three railways, what is understood by the term "sidetrack"? Is a track, whether or not subject to such uses in interstate commerce, but subject to such uses in intrastate commerce, a sidetrack? Is a track laid across three public highways and two railroads by a corporation having no authority to lay it, existing in violation of the plain statutes of the State of Illinois prohibiting its location, a sidetrack within the meaning of this statute? Is a track unlawful in its conception, design and construction a sidetrack? Can this Court endorse the conclusions of the Interstate Commerce Commission and the three judge court that a track which can alone be constructed or maintained under the authority of the State of Illinois and has been condemned as unlawful by the court of last resort of that state, is such a sidetrack as Congress intended to authorize a connection with by Paragraph 9 of Section 1 of the Interstate Commerce Act? We think this Court must conclude that the Commission and the Court are both in error in holding that it is, as a matter of fact, a sidetrack within the meaning of Paragraph 9. The evidence shows conclusively it is not and never was intended to be a sidetrack (supra, page 45 [4]). What is and what is not a sidetrack and the distinction between a sidetrack with which the Interstate Commerce Commission may order a connection and a connecting railway, or an extension of railways, is a question depending somewhat upon the facts of each case. The Supreme Court of Illinois said: "Each case must rest largely upon its own

facts" (II-F-[a], Brief, p. 71). But, neither Commissions nor courts have the power to arbitrarily disregard evidence which conclusively establishes facts, nor to find a fact as an inference from evidence which does not tend to prove the fact found. That is precisely what the Commission did and what the District Court has approved. The evidence to which we have just drawn attention does not tend in the slightest degree to establish that this track is a sidetrack even if the uses to be made of it in the mining business of appellee be exclusively considered. This would be the operation intended—cars could be taken from the assembly yards to appellant at Harrisburg in trains a distance of three miles and a half to the connection, thence three miles over this track and spotted at the mine of appellee. When loaded, upon notice, appellant would bill the cars to destination on a single through rate, including the entire charge for spotting and transporting the cars. They would then be taken to appellant's assembly yards at Harrisburg, classified and sent out on trains. This operation would only be varied according to the plans of appellee by the cars being delivered to either the Illinois Central or the Power Company at the connection, thence taken to the mine, located and returned to the connection, in either of which cases the appellee would pay an interline switching charge. In that event there would be a separate railroad service performed by a separate and distinct railroad, and it would in all respects be equivalent to a connecting line movement of coal in

transportation to destination from the mine to the connection. The movement would be precisely the same as if the cars were delivered to the Illinois Central at the Eldorado connection and treated in like manner. The cars would at no time stand on this track as a sidetrack. It would be kept open at all times as a main track and the three railroad companies would be compelled to keep in touch with each other to effect its joint use, as contemplated by the contracts under which it was built. If it should be said in answer to this contention that the Interstate Commerce Commission has not authorized such uses of the track the reply is that the Constitution and laws of the State of Illinois, if the track is to be used mandatorily, require that it be so used in intrastate commerce, and since group rates apply from these mines to all Illinois markets without reference to the number of railways over which the traffic may be carried, all coal produced at this mine could be routed over appellant's line to its end at Danville and delivered to the C. & E. I., thence into Chicago, and thus 9 per cent of the product of that mine be carried over this track. We insist that whether this track is a sidetrack or a connecting railway depends as much upon its intrastate as its interstate uses, and the intrastate uses of the track, its connection and maintenance, the losses which may result from its operation, either directly to the public or indirectly to appellant are as much a matter of national concern, if that result comes through intrastate operation, as through interstate operation. We have

already shown that the authorities establish beyond question that a key to a determination of the character of this track is furnished by Paragraphs 18 to 22 of Section 402 of the Transportation Act (now Section 1 of the Interstate Commerce Act), and that both the courts of Illinois and this Court have held that the determining factor is the result which would come from the use of the track; that if it causes a duplication of construction, maintenance and operation or affords a means of competition it must be regarded in law as a connecting railway or an extension of railways. Under this division we have again cited the cases to which we heretofore drew the attention of the Court (II-F, Brief, p. 81).

Appellee's Track Was Built as an Interstate Railway Without a Certificate of Public Convenience and Necessity to Be Operated by the Illinois Central, the Power Company and Appellant (II-G, Brief, p. 84).——We think we have shown that this track is not a private track. The facts upon which we rely to establish that contention also establish that it is an interstate railway and an extension of railways with which it is and shall be connected. In its report the Interstate Commission assumed, contrary to the fact, that we predicate our contentions as to the character of this track solely upon the contracts under which it was built. That is not correct. We base them upon all the facts to which we have drawn attention and the law as well which defines what is meant by the

words "private sidetrack." The Commission intimated that if either the Central or the Power Company should attempt to operate this track in interstate commerce it would have to come to it for a certificate of public convenience and necessity. We have searched the cases in vain for any authority that would justify such a construction of the law. The statute requires a certificate of public convenience and necessity before undertaking the construction of a new track to be used in interstate commerce. The theory of the Commission seems to be this: "Here is a track which under the laws of Illinois could not be built. It was built to be used in interstate commerce to be connected with interstate railroads and used by them. We will disregard the intent for which it was built We will disregard the want of legal authority to build it. We will disregard its legal character as an interstate railroad. We will disregard that the complainant is not a shipper on the railway of respondent. We will disregard that the track, whether a spur track, sidetrack, lateral branch line, an extension of railways or a connecting railway, is a public track. We will disregard that because of its location, construction and intended uses under the laws of Illinois it is a public track. We shall assume for the purpose of compelling respondent to comply with the demands of complainant that the complaint is made by a shipper in interstate commerce. We will consider that his intention to ship in interstate com-

merce after he has had the aid of this Commission is sufficient to give him the present status of a shipper in interstate commerce on the railway of respondent. We will consider that the track is a private sidetrack, though if a private sidetrack its construction and abandonment are subjects exclusively within the jurisdiction of the courts of Illinois, and that the Supreme Court of Illinois has held that it is unlawful and must be abandoned. We will assume that it is a sidetrack, though it has no resemblance in construction, location or intended uses to what has heretofore been understood to constitute a sidetrack. We will assume that as complainant is located, respondent owes him the duty of a common carrier, though we have heretofore held that respondent owes to it no such duty. Notwithstanding we have heretofore held that to require respondent to give service to complainant's mine located on the railway of the Illinois Central two miles and a half from the railway of respondent would be to require respondent to extend its railway to complainant's mine, and that we have no authority under the law to do that, we will under the present circumstances forget our conclusions on that occasion. What we will do is to order the connection and if the track shall hereafter be operated as the parties intend in interstate commerce if complaint shall be made to us we shall *then* enter an order requiring those who attempt to operate it in interstate commerce from doing so, but all this time we will keep the track connected with the railways

as ordered, notwithstanding to maintain the track with such a connection would constitute it an unlawful track in violation of the Constitution and laws of the State of Illinois. In other words, notwithstanding the State and Nation are associate sovereignties each supreme within its jurisdiction, and notwithstanding the jurisdiction of Illinois exclusively covers the construction and maintenance of this track, yet because we have authority to order a switch connection with a track which *may be built* we will assume that Congress by the words '*may be built*' means that if the track is physically built no matter how built or whether it can be maintained Congress authorized the co-ordinate sovereignty, the United States, to aid the malefactors who built this track in violating the law of the sovereignty, Illinois, which the Constitution requires us to protect when acting within the scope of its jurisdiction." We submit that this attitude of the Commission is directly in conflict with the decisions of the Supreme Court of Illinois and of this Court; that if it is possible by evidence and authority to establish that a particular construction is a connecting railway and an extension of railways, the evidence and the decisions of the Supreme Court of Illinois and of this Court establish that such is the character of this track. We have cited and quoted elaborately from the authorities to which we have already drawn attention in the corresponding division of our brief to which we invite the consideration of the Court (II-G, Brief, p. 84).

Appellee's Track With Respect to Interstate Commerce Is a Public Track and Part of the Railway Systems of Illinois (II-H, Brief, p. 100).———In discussing other phases of this case we think we have satisfactorily shown that aside from the use of this track as an interstate railway it is a public track; that if it shall be maintained connected with the railway of appellant it will be a part of the intrastate railway system of the State of Illinois. We now insist that it maintains the same public charter in its relation to interstate commerce, that if the public has the right to use it in either interstate or intrastate commerce, or the right to use it regardless of either, it is a public and not a private track. The great concern of appellee when authority was obtained from the Illinois Commission to build this track and a petition filed to require its connection was the benefits that would come to the appellee and its associates in the use of the track in intrastate commerce. A reference to the record will show that throughout the proceeding it was insisted that appellee desired the markets located on the Big Four in Illinois. It desired to compete with the mines upon appellant's railway on equal terms as though its mine were located thereon, and obtaining a facility to enable the Illinois Central to invade appellant's coal field was emphasized as a paramount object. It was pointed out in that case that from 85 to 90 per cent of the coal from that territory was transported to destination in intrastate commerce. It was alleged appellee suffered a disadvantage in reaching

those intrastate markets. When it was pointed out that appellant's railway did not extend to Chicago and that its regular route of transportation is intrastate, it was replied that a connection at Danville with the C. & E. I. would complete an intrastate route over appellant's railway to Chicago and that the rate would be the same as charged local mines on appellant's road over the regular interstate route. So, if this track shall be used in intrastate commerce, as originally intended, then the effect both upon the appellant and the public would be substantially the same as if operated in interstate commerce. That would be accomplished through the friendly offices of the Federal Government and in violation of the Constitution and laws of the State of Illinois. We are aware that the Constitution and laws of the State of Illinois in face of Federal jurisdiction are mere waste paper, but the Federal statute and this Court have established beyond the possibility of doubt that the construction and maintenance of this track, if a private sidetrack as found by the Commission, are within the exclusive jurisdiction of the State of Illinois. It is only by the contention that a mere incident of a track connection within the jurisdiction of the Federal Government the grant of exclusive jurisdiction conferred by Congress may be withdrawn. It is our contention that no such construction of the law is allowable. The incident never gives color to the principle thing, but the principle gives color to the incident. The connection does not make the track, the track is merely

made useful by the incident—in connection. The *private* sidetrack must exist before the connection can be required. No private sidetrack did exist. It must have been a private sidetrack which "*may be constructed.*" The Federal Government cannot at the same time say that it is a track which may be constructed and recognize the authority of the state to say whether or not it "may be constructed." There was no permission under the laws of Illinois to construct this track. Aside from these considerations would not this track operated in intrastate commerce violate the policy established by the Transportation Act? Paragraph 9, and Paragrapns 18 to 22 of section 1 of the Interstate Commerce Act are laws in pari materia. The former existed in its present form when the latter was enacted by the Transportation Act. It follows that in construing the two classes of provisions together the Transportation Act must be regarded as a modification of the preexisting provisions contained in paragraph 9. This Court has held that the Transportation Act completely changed the policy in relation to railroads, and that while previous to its enactment regulation of rates by competition and the construction of new railways, lateral lines, spurs and sidetracks to promote competition was a legitimate exercise of railroad power, that policy has been changed by the Transportation Act and now the key to a construction of these provisions in connection with each other is the intent of Congress by the later law to establish a new policy prohibiting duplica-

tions of railway lines and extensions and tracks built for the purposes of competition, the design being to foster and protect existing railway systems and prevent ruinous duplications and competition, the losses of which ultimately fall upon the public. A track, therefore, built to effect the objects sought to be prohibited by the Transportation Act is in plain violation of the new policy established by that act and is a matter which should have had the consideration of the Commission and the three-judge court, although the injurious effect is sought to be accomplished through operations intrastate as distinguished from interstate commerce. The record shows that at least 90 per cent of the coal shipped from this district reaches destination in intrastate transportation. Tracks built for the transportation of coal from this district are, therefore, built for use in intrastate commerce. The duplication of new tracks and extensions constructed for that use by an interstate railway or to be used by an interstate railway in intrastate transportation would, therefore, cause the same losses to interstate railways from duplication and the construction of competitive lines as though they were constructed for use exclusively in interstate transportation. So, such construction was intended by Congress to be prohibited without a certificate of public convenience and necessity from the Interstate Commerce Commission. If it should be held that such duplication, additional capitalization and competition can be maintained by interstate railways in intrastate operation, then

the railways of the country, with the permission of the several states, would undoubtedly be able to evade and practically nullify and defeat the policy of Congress in enacting paragraphs 18 to 22 of section 1. No construction of these provisions is allowable which would nullify the paramount object of Congress as defined by this Court (II-H, Brief, p. 100).

Appellant's Track Considered Merely as a Sidetrack Connected with a Public Railway Is Not a Private Track (II-I, Brief, p. 101).——We have discussed various aspects of this track as public and private or as a connecting track or an extension of railways, but have not discussed it as purely a sidetrack regardless of whether it is to be used in interstate or intrastate commerce. If it be assumed that it is a mere sidetrack, as that term is ordinarily used and understood, to be used by a shipper exclusively in the transportation of coal from a mine on the railway with which it is connected, it is as to the public and the railway with which it is connected a new facility of the railway company which could not be constructed without a certificate of public convenience and necessity. Section 55 of the Public Utilities Act of Illinois provides:

> "No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have

obtained from the Commission a certificate that public convenience and necessity require such construction" (1925 Cahill's Ill. Stat., Chap. 111a, Sec. 55, p. 1902) (II-I-[a], Brief, p. 101).

As we have previously shown from the citation of authorities, it is an established doctrine in Illinois that any track connected with a public railway becomes a public track if it is so located and situated that it can be used generally by the public. We have shown by the evidence that this track is so located and situated. It extends through the lands of a large number of landowners who might locate industries on both sides of it its full length. Spur tracks might be extended from it into the extensive coal fields lying both east and west of it in Saline County. Wye connections with the main tracks of the Illinois Central and the Power Company would give them the free use of it. It is located across three public highways. Therefore, under the decisions of the Supreme Court of Illinois it is not only a public track, but with respect to the public and the railways with which it is connected it is the track of such railways and a part of their railway systems. It makes no difference that the title to the track may be in the appellee, nor that the appellee may have constructed it and now owns it (Public Utilities Commission v. Smith, 298 Ill. 159; St. Louis, Springfield & Peoria Railroad v. Illinois Commerce Commission, 309 Ill. 621; C. C. C. & St. L. Ry. Co. v. Illinois Commerce Commission, 315 Ill. 461).

Whether it is a public track or a private track considered merely as a facility of the Illinois Central or appellant, or both, is a question exclusively within the jurisdiction of the sovereign State of Illinois, and its Constitution, laws and the decisions of its court of last resort that it is a public track.

Appellee Is Estopped to Deny the Facts and Conclusions Found by the Supreme Court of Illinois (II-J, Brief, p. 102).———Appellee first applied to the Illinois Commerce Commission to coerce a connection between its new track and appellant's railway. The proceeding before the Illinois Commission was under an Illinois statute substantially like paragraph 9, Section 1 of the Interstate Commerce Act. It involved a consideration by the Illinois Commission of the question of jurisdiction, that is, whether the matter was one of which the Interstate Commission or the Illinois Commission had exclusive jurisdiction. By the provisions of paragraph 22 of section 1 it was clearly a matter not within the jurisdiction of both commissions. Appellee elected to first apply to the State Commission and accordingly invoked the exercise of its jurisdiction, and all the questions, both of law and fact, here involved were there presented and subsequently adjudicated to a final conclusion in the court of last resort, the Supreme Court of Illinois. The final judgment of that Court stands unreversed and unchallenged. While that case is not this case, that is, there is not an absolute identity of the two

cases, because the proceedings were in different jurisdictions under slightly different statutes, the parties are the same, the issues the same, the relief prayed the same and the material facts identical growing out of precisely the same transactions. The records in both cases were before the Interstate Commission. The final adjudication of the Illinois case was pleaded as an estoppel in the bill and the allegations sustained by the proofs. In such cases the doctrine of estoppel applies. On this subject Bigelow says:

> "The class of cases now to be considered is that in which an estoppel arises regardless of any identity in the cause of action; the only requirement now being that the point in issue, as distinguished from the whole cause of action, shall be identical in the two cases. In these cases the judgment operates as an estoppel in regard to those matters in controversy, upon which, or upon the determination of which, the verdict or finding, as distinguished from the judgment itself, was rendered."

This rule is applicable to the decisions of boards, commissions and courts of limited and special jurisdiction and to the decisions of public officers required to exercise judgment and decide issues (II J-[a], Brief, p. 102). "A judgment at law in any form of action is conclusive upon the parties upon all questions, tities and rights involved in the litigation and passed upon by the Court, which the Court had power and jurisdiction to hear and determine,

and nothing more; and when the same questions or the same rights or titles are again drawn in issue, whether in a court of law or equity, between the same parties or their privies the previous adjudication will be regarded as conclusive upon them" (Hawley v. Simons, 102 Ill. 115). "When some specific question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit without regard to whether the cause is the same in both suits or not. This is known as an estoppel by verdict and is equally available to the plaintiff in support of his action when the circumstances warrant it, as when offered by the defendant as a matter of defense" (Hannah v. Read, 102 Ill. 596) (II-J-[c], Brief, p. 103). This rule was applied by this Court in Cromwell v. Sac County, 94 U. S. 350, 24 L. ed. 198 (II-J-[d], Brief, p. 104). That the decision of a state court relates to rights sought to be exercised under a grant from the Federal Government would make no difference (Stone v. Southern Illinois and Missouri B. Co., 206 U. S. 269, 51 L. ed. 1059) (II-J-[e], Brief, p. 106). This rule is applicable as between the jurisdiction of the state and federal courts, in pursuance of Section 1, Article IV of the Constitution of the United States, which provides:

> "Full faith and credit shall be given in each state to the public acts, judicial records and proceedings of

every other state, and Congress may, by general law, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof" (II-J-[f], Brief, p. 107).

The courts of the United States are bound to give the judgments of state courts the same faith and credit that courts of one state are bound to give to the judgments of courts of another (Cooper v. Newell, 173 U. S. 567, 43 L. ed 812; Wisconsin v. Pelican Insurance Co., 127 U. S. 291, 32 L. ed. 239) (II-J-[g] and [h], Brief, p. 107). The Supreme Court of Illinois settled all the issues of fact involved in this case in favor of appellant. (No question of jurisdiction was involved.) The record in evidence, to which we drew attention in stating the issues, shows that the same questions of law and fact involved here were raised by the assignment of errors in the Supreme Court, and the opinion of the Court and the judgment of reversal show that the same questions were involved in the issues and decided (R. 452-473).

The three judges sitting in the District Court should have applied the rule of estoppel and followed the conclusions of the Supreme Court of Illinois upon the questions of fact decided by that Court in adjudicating the order of the Illinois Commission.

The Order of the Interstate Commerce Commission Requiring Connection With Appellee's Track on the Theory That It Is a Private Sidetrack Is Not Only Contrary to Law But in Violation of a Penal Statute (II-K, Brief, p. 109).———It is but a matter of inspection to ascertain that Paragraph 9 of Section 1 of the Interstate Commerce Act had not been changed or modified since its enactment many years ago. It has been carried in various editions of the federal statutes without modification. However, by the enactment of the Transportation Act, it was amended and limited in its operation so that no order can be entered under it which conflicts with the spirit and intent of the statute as defined by the federal courts (Detroit & Mackinaw Railway Company v. Boyne City Ry., 286 Fed. 540; Railway Commission v. Southern Pacific R. Co., 264 U. S. 331, 68 L. Ed. 713, at 764; Texas & Pacific v. Gulf, Colo. & S. F. R. Co., 270 U. S. 277, 70 L. Ed. 583; Western & Atlantic R. Co. v. Georgia Public Service Commission, 267 U. S. 493, 497, 69 L. Ed. 757). The same policy established by these authorities prevails in Illinois (Choate v. Commission, 309 Ill. 256).

Section 55 of the Public Utilities Act prohibits any utility from beginning the construction of any new plant, equipment, property or facility without first obtaining a certificate of public convenience and necessity.

Sections 76 and 77 of the same act provide severe penalties for beginning the construction of any such new

plant, equipment, property or facility without such certificate.

Paragraph 18 of Section 1 of the Interstate Commerce Act provides that no railroad company shall undertake the extension of any line or the construction of any new line of railroad without first obtaining a certificate of public convenience and necessity, and paragraph 20 of the same section provides a penalty of five thousand dollars for any construction, operation or abandonment of a railway contrary to the provisions of paragraphs 18 and 19. So, it is very plain that the order of the Commission is in direct violation of the penal provisions of the Illinois Commerce Law or the Interstate Commerce Act (II-K-[a]-[b]-[c]-[d], Brief, pp. 109-111).

Rightfully construed there is no antipathy or conflict between state and federal laws on this subject. Indeed such a conflict could not exist. In any field occupied by a federal statute, or by the Federal Constitution without a statute where the provision is plenary and self-executing, the federal provision is the supreme law of the land and excludes all authority in the state to legislate, but where a federal statute yields to the jurisdiction of a state in a matter not excluded from state jurisdiction by the Federal Constitution, state jurisdiction is equally exclusive and supreme. The reason for yielding to the state's jurisdiction of side, spur and industrial track construction and discontinuance was fully explained by the opinion of Chief Justice Taft in the case of Railroad

Commission v. Southern Pacific Company, 264 U. S. 544, in which he said:

> "One might, too, readily conceive of railroad crossings or connections of interstate carriers in which the exercise by a State Commission of the power to direct the construction of merely local union stations or terminals without extensions of main tracks and substantial capital outlay should be regarded as an ordinary exercise of the police power of the state for the public convenience, and would not trench upon the power and supervision of the Interstate Commerce Commission in securing proper regulation of an interchange of interstate traffic or passengers. Only a lawful order of the Interstate Commerce Commission would raise a question of the power of a State Commission in such cases, as the proviso of Par. 17, Sec. 402, of the Transportation Act, shows; • • • But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind. They come within Pars. 18 to 21 of Sec. 402, and require a certificate of the Interstate Commerce Commission **as a condition precedent** to the validity of any action by the carriers, or of any order by the State Commission."

In the later case of Western & Atlantic v. Georgia Public Service Commission, 267 U. S. 497, 70 L. ed. 756, the same Justice directly construed the intent of Congress

to be the giving of exclusive jurisdiction to the states under the proviso contained in paragraph 22, and held that the contention that the track under construction would be used 85 per cent in interstate commerce would have no bearing.

These reasons apply and were held to apply with equal force whether the sidetrack is used partially or wholly in interstate commerce. The reason why this Court held that the degree or extent of use of the track for one or the other does not determine whether it is or is not subject to state or federal jurisdiction is that no such test was prescribed by the Act of Congress. This principle applies also to the other provisions of the Transportation Act the same as to paragraph 22 of section 1. For instance, if an interstate railway should be extended a certificate of convenience and necessity would be required from the Interstate Commerce Commission before undertaking the extension and it would make no difference that the extension would, when complete, be used exclusively in intrastate commerce. Nor would the rule change because the extension would lie wholly within a single state and be an extension of the railway lying wholly within a single state. That the extension might injuriously affect a railway corporation engaged in interstate commerce and that such injury might be passed on to the public, thus violating the public policy declared by Congress would be sufficient to warrant an application for a certificate of pub-

lic convenience and necessity or authorize the restraint of the undertaking without such certificate. The language of Chief Justice Taft, quoted from the Southern Pacific case, supra, shows clearly that the certificate in that case must precede the undertaking, but we should again note that in this case the Interstate Commerce Commission reserved a consideration of whether a certificate should issue until operation shall begin. It also held that the contracts which provide for the operation of this track in interstate commerce as parts of at least two interstate railways is not indicative of the character of the track. That holding is quite in contrast with the position it took in the case of the application of the Southern Illinois & Kentucky for a certificate of public convenience and necessity (People v. Illinois Central R. R. Co., 324 Ill. 599). The Illinois Central projected a cut off to be constructed from the main line of its Chicago-New Orleans railway departing at Edgewood and reconnected at Fulton, Kentucky. It caused to be organized the Southern Illinois & Kentucky, an Illinois corporation, to construct from Edgewood to Metropolis, on the Ohio River. The officials of the Illinois Central applied to the Interstate Commerce Commission and represented that it would, when constructed and put in operation, carry interstate commerce. This was regarded as entirely adequate to warrant the Commission in assuming jurisdiction and granting a certificate of public convenience and necessity, and the Supreme Court of

Illinois held that such assumption of jurisdiction and order of the Commission so acquired and made divested the State of Illinois of all jurisdiction and authority over the construction of the railway, though when constructed the power will still reside in the Illinois Central if it choose to operate this branch exclusively in intrastate commerce. On the other hand, the connections and uses of appellee's track must be by interstate railways if operated at all, and the contracts under which it was built provide for its use in interstate commerce.

We have endeavored to point out the misconceptions of the record, the misapplication of the authorities and the inconsistencies of the order of the Interstate Commerce Commission in treating this case as one merely of a denial of service to a shipper on appellant's railway, and of the District Court in approving the order of the Commission. The errors are so outstanding that we can reach no other conclusion than that the action of both Commission and Court resulted from a misapprehension of the questions involved, and the views voiced that appellant was under duty to give requested service to "anybody, anywhere and under all circumstances." This was manifestly a wrong premise from which to give a correct consideration of this record and deduce a result in accord with the decisions of this Court.

We respectfully submit that the decision and decree of the District Court dismissing the bill for want of equity

should be reversed and the orders of the Interstate Commerce Commission held to be null and void and set aside.

All of which is respectfully submitted.

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MAPS

TOO

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